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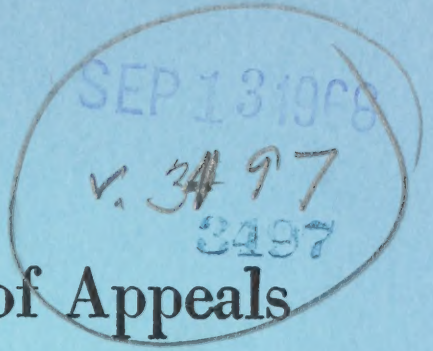
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No. 22,654

In the

United States Court of Appeals

For the Ninth Circuit



DON W. McNAMARA and GENEVIEVE C.
McNAMARA,

Appellants,

vs.

JONES & GUERRERO Co., INC.,

Appellee.

Brief of the Appellants

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vs.

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Appellee.

Brief of the Appellants

ISSUE PRESENTED FOR REVIEW

At the time the summary judgment was rendered in this action, were there pending genuine issues as to any material facts?

NATURE OF THE CASE

This is an action by an employer (appellee) for damages for the breach of an employment contract (Transcript p. 1) and on an account stated (Transcript p. 2) wherein the employees (appellants) counterclaim for damages for fraud (Transcript pp. 39-40) and to recover their wages. (Transcript pp. 40-1)

COURSE OF PROCEEDINGS

On 31 January 1967 the employer filed its complaint (Transcript pp. 1-2), and the employees filed their answer on 28 September 1967 stating their counterclaims. (Transcript pp. 39-41) On the latter date the employees demanded a jury trial. (Transcript p. 45) The employer answered on 6 November 1967 (Transcript p. 68) and, thereafter (on 21 November 1967), the employer moved for summary judgment. (Transcript p. 75)

DISPOSITION IN COURT BELOW

On 14 December 1967, without giving the employees any opportunity to be heard (Transcript p. 89), the court below granted the motion and entered summary judgment in favor of the employer. (Transcript p. 95) The employees filed their notice of appeal on 28 December 1967. (Transcript p. 97)

FACTS RELEVANT TO ISSUE

In their answer (Transcript pp. 36-41) the employees raised genuine issues as to material facts by denying *inter alia* that they quit without the consent of the employer; that they owe the employer any sum pursuant to the employment agreement; that an account was stated between the parties; that any sum was found due the employer from its employees upon the statement; or that the employees agreed to pay the employer any amount. (Transcript pp. 36-7)

The employees raised additional genuine issues as to material facts by setting forth affirmatively in their answer (Transcript pp. 36-41) the following defenses (Transcript pp. 37-9) :

“FOURTH DEFENSE

“6. Defendants [the employees] have performed all of the conditions of the agreement set forth in the amended complaint except defendants failed to con-

tinue their employment for a full period of 24 months as provided in said agreement.

“7. Defendants failed to perform said condition in said agreement for the reason that plaintiff [the employer] prevented performance by requiring defendants to work approximately an average of 18 hours per day; requiring defendants to work never less than six and often as much as seven days per week; never giving defendants any managerial authority but assigning them staff positions and requiring them to perform mineal services under the management of Robert H. Jones; assigning defendants the duty of personally operating the motel and a great number of housing units other than the motel; not having an operable restaurant before 26 November 1966; not, prior to 26 November 1966, giving defendants meals without cost to them and thereafter not giving defendants more than one such meal per day; furnishing defendants with an inadequately furnished, dirty motel room; and selling defendants an automobile considerably above cost.

“8. Defendants were and are ready, willing, and able to perform said condition of said agreement.

“9. On or about 27 January 1967 defendants tendered full performance of such condition of said agreement, but plaintiff refused and continues to refuse to permit defendants to perform said agreement.

“FIFTH DEFENSE

“10. On or about 24 and 25 September 1966 plaintiff, intending to induce defendants to enter the agreement set forth in the amended complaint, stated and represented to defendants that defendants would be required to work no more than 40 hours per week; defendants would have two work-free days per week; defendants would be restaurant and hotel managers; defendants main duties would be restaurant operation and only would have to inspect motel rooms and super-

wise motel staff; the restaurant would be operable by 18 October 1966; defendants would receive all of their meals without cost to them; defendants would be furnished an adequate, furnished house; and defendants would be sold an automobile at cost.

“11. Said statements and representations made by plaintiff were false and fraudulent and were known to be false and fraudulent when made.

“12. On or about 18 October 1966 defendants executed said agreement, relying on said statements and representations made by plaintiff and believing them to be true.

“13. In truth and in fact defendants were required to work approximately an average of 18 hours per day; defendants were required to work never less than six and often as much as seven days per week; defendants were never given any managerial authority, but they were assigned to staff positions and required to perform mineal services under the management of Robert H. Jones; defendants were assigned the duty of personally operating the motel and a great number of housing units other than the motel; the restaurant was not operable before 26 November 1966; prior to 26 November 1966 defendants received no meals without cost to them, and from said date they each received only one such meal per day; defendants were furnished with an inadequately furnished, dirty motel room; and defendants were sold an automobile considerably above cost.

“14. Defendants did not know the truth with regard to said statements and representations and would not have entered said agreement if they had known the truth with regard to said statements and representations.

“SIXTH DEFENSE

“15. Plaintiff failed and refused to perform the conditions required by said agreement, and, as a result,

there has been a failure of consideration that plaintiff agreed to give defendants for their performance under said agreement.

“SEVENTH DEFENSE

“16. Said agreement referred to in the amended complaint is unenforceable for the reason that it is oppressive and contrary to public policy.

“EIGHTH DEFENSE

“17. On or about 27 January 1967 and after the making of the agreement set forth in the amended complaint but before any breach by defendants thereof, it was mutually agreed by plaintiff and defendants that said agreement should be rescinded.”

Genuine issues as to material facts were raised by the employer in its reply (Transcript p. 68) to the employees' counterclaims. (Transcript pp. 39-41) The employer denied that it represented to the employees they would be required to work no more than 40 hours per week; they would have two work-free days per week; they would be restaurant and hotel managers; their main duties would be restaurant operation; they would only have to inspect motel rooms and supervise a motel staff; the restaurant would be operable by 18 October 1966; they would receive all of their meals without cost; they would be furnished an adequate, furnished house; and they would be sold an automobile at cost. The employer also denied that the employees were required to work an average of 18 hours per day; they were required to work never less than six and often as much as seven days per week; they were never given any managerial authority but were assigned to staff positions and required to perform mineal services; they were assigned the duty of personally operating the motel and a great number of housing units other than the motel; the restaurant was not operable

before 26 November 1966; prior to 26 November 1966 the employees received no meals without cost to them and from said date only one such meal per day; they were furnished with an inadequately furnished, dirty motel room; and they were sold an automobile considerably above cost. In addition the employer's reply denied that when it made the representations it knew them to be false; that the statements were made by it with the intent to defraud and deceive the employees and to induce them to act in the manner averred in their counterclaims; that the employees (at the time the representations were made) were ignorant of their falsity but believed them to be true; that in reliance thereon they were induced to enter into the agreement and (on or about 29 October 1966) traveled from the United States to Guam, settled in Guam, and commenced performance of the agreement; that had they known the true facts they would not have taken such action; that they had been damaged in the sum of \$3,000; that they have duly performed all of the conditions of the agreement; that by the agreement the employer agreed to pay them for their services \$1,000 per month for 24 months; or that any sum is due for their services.

In response to the employer's motion for summary judgment (Transcript p. 75) the employees preserved all of the above genuine issues as to material facts by filing an affidavit (Transcript pp. 82-7) in opposition thereto. In the affidavit (Transcript pp. 82-7) they said,

"1. The Plaintiff herein was in default of the terms and provisions of the October 18, 1966 agreement, a copy of which is attached to the Complaint herein, prior to Defendants' termination of employment therewith, Plaintiff having already breached said agreement by reason of the hereinafter set forth facts.

"2. Defendants Don W. McNamara and Genevieve C. McNamara are of the age of fifty one (51) and fifty two (52) years, respectively.

"3. Defendants have been engaged for the last 20 plus years in hotel and apartment management duties; that Defendant Don W. McNamara's last position was as manager of the Pine Terrace Apartments, 1001 Pine, San Francisco, California; that prior thereto and for a term of four years, he was manager of the Del Charo Apartments, Mt. View, California.

"4. On or about September 24, 1966, Defendants answered an ad in the San Francisco Examiner with respect to a position in the hotel-apartment business in Agana, Guam; that Defendants met with Mr. James Smith, Vice President of the Plaintiff, and the following representations with respect to a job in Agana, Guam with the Plaintiff were made by said James Smith to Defendants:

"(a) Plaintiff was a motel and restaurant operator in Agana, Guam;

"(b) Plaintiff was looking for a manager for a restaurant which was soon to be opened and which was to be the finest on the island of Guam; that Plaintiff was looking for a manager for said restaurant and for the management of a motel owned by Plaintiffs; that the said restaurant was ready to open;

"(c) Defendants' main duties would be to manage the restaurant and insofar as the motel was concerned the Defendants' only duty would be to occasionally inspect rooms and supervise the present staff; and that Defendants would be required to work only 40 hours per week and that there would be ample time for them to get away weekends to visit neighboring islands including Hong Kong and Tokyo;

"(d) Plaintiff assured Defendants that they would be in full management control of said restaurant and motel, subject, of course, to the reasonable but limited supervision of Mr. Robert Jones;

"(e) Said James Smith promised Defendants they would be furnished housing by the Plaintiff suitable to their position in Plaintiff's operations and comparable

with the best residences in Agana, Guam, and that such residences would be available in any event for rents not exceeding \$125 a month.

“5. Defendants accepted Plaintiff’s offer of employment in reliance of the foregoing representations and thereupon executed the agreement which is set forth as an attachment to the Complaint herein — *which agreement was prepared at the behest and direction of the Plaintiff and by its attorneys.*

“6. After Defendants arrived in Agana, Guam on or about 29 October, 1966, they found that Mr. James Smith, agent of the Plaintiff had misrepresented each and every one of the representations set forth in paragraph 4 hereof and that the building which was to become the new restaurant (subsequently called The Red Carpet Steakhouse) was surrounded by weeds and nothing had been done to the interior of the building to put it in condition for its opening; the motel turned out to be a twenty unit inadequate building known as the Cliff Motel; Defendants’ salaries did not commence until November 1, 1966 and the restaurant did not open until November 26, 1966.

“7. The duties assigned Defendants were over and beyond the duties they had agreed to undertake pursuant the agreement which is attached to the Complaint for in addition to the agreements set forth therein as Defendants understood them pursuant the oral representations made to Defendants prior to the execution of said agreement, Defendants were required to work approximately an average of 18 hours per day and never less than six and often as much as seven days per week; Defendants were assigned an additional job of managing the Plaintiff’s housing, staff and rental units and were charged with the duties of receiving complaints, issuing work orders, showing and renting apartments in Maite as J & G Housing, including sixteen rental units which had to be cleaned up and set up as motel rooms, and Defendants were not given the managerial authority they required to perform their duties.

“8. Said James Smith was aware at the time he made the previously mentioned representations to Defendants that said representations were false; that said James Smith made said representations with a malicious intent knowing them to be false and knowing that said representations would be relied upon by the Defendants to the detriment they now find themselves in; that said James Smith acted fraudulently and maliciously in the making of said representations.

“9. Plaintiff and its principal officer Robert Jones were at all times aware of said fraudulent misrepresentations made by James Smith to the Defendants.

“10. Defendants recognizing the fact that Plaintiff had breached its contract with Defendants and having lost all patience with the Plaintiff's method of operation, on or about January 26, 1967 decided to serve Plaintiff with notice of Defendants' intention to leave Plaintiff's employment; Defendants orally informed Robert Jones of their reasons for leaving Plaintiff's employment; that Defendants thereupon sent Plaintiff a January 26, 1967 letter referred to at page 3 of the Plaintiff's amended motion for summary judgment; that although Plaintiff has used that letter for the purpose of evidencing a repudiation of the contract such was clearly not the intention of the Defendants; that although Defendants believed they had good cause for leaving the Plaintiff's employment and although they had made those reasons orally known to the Plaintiff they did not want to leave the Plaintiff's employment under unpleasant circumstances and consequently sent Plaintiff the January 26, 1967 letter; Defendants had no desire to engage in litigation with Plaintiff on the island of Guam and only wished to leave the island and return to their home without repercussions arising out of the potential dispute they might have with Plaintiff; Defendants are not the kind of people who would make harsh accusations in a letter and expected to do so only as a last resort; furthermore, Defendants did

not want it a part of their record that they had terminated employment under unpleasant circumstances; they believed the contract had already been repudiated by the Plaintiff by reason of Plaintiff's aforesaid misrepresentations; Defendants believed they had made a mistake in accepting employment with the Plaintiff on the island of Guam and in accepting Plaintiff's representations but it was not in their nature to accuse Plaintiff at that time of an act of fraud.

"11. Defendants incorporate by reference herein each and everyone of the allegations made in the answer and counterclaims filed herein by Defendants' attorneys Barrett, Ferenz, Trapp & Gayle on the 6th day of November, 1967 and adopt said allegations as if set forth in full herein."

SUMMARY OF ARGUMENT

The Summary Judgment Herein Should Not Have Been Rendered, as There Were Pending in This Action Genuine Issues as to Material Facts.

According to Federal Rule of Civil Procedure 56(c),

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The employees believe they have amply demonstrated above that there were many genuine issues as to material facts pending in this action.

It is realized by the employees that their statement of the case is extremely prolix. It was necessary, however, to attempt to set forth each "genuine issue as to any material fact" raised in the court below.

While the employees' statement of the case may not make interesting reading, this court must of course examine the transcript to determine whether there was any genuine issue

as to any material fact pending when the court below entered its summary judgment. The employees can only set forth for this court, in as orderly a manner as they are able, the genuine issues as to material facts as they were raised, and submit the issue presented for review for this court's decision.

It is urged, however, that that decision will have to be based on the rules of law hereinbelow.

ARGUMENT

1. Summary Judgment Is Authorized Only Where After Looking at the Record in the Light Most Favorable to the Opposing Parties It Is Quite Clear What the Truth Is and That There Is No Genuine Issue Remaining for Trial.

The Supreme Court of the United States has held,

“Summary judgment should be entered when the pleadings, depositions, affidavits, and admissions filed in the case ‘show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ . . . This rule authorizes summary judgment ‘only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.’ . . .

“

“ . . . We look at the record on summary judgment in the light most favorable to . . . the party opposing the motion” *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467, 473, 7 L.Ed.2d 458, 82 S.Ct. 486 (1962); *Consolidated Electric Co. v. United States*, 355 F.2d 437 (9th Cir. 1966); *United States v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964).

2. Since the Employees Have Demanded a Jury Trial Herein, the Court Below and This Court Should Be Extremely Cautious That It Be Not Denied Them.

In the decision just quoted, the Supreme Court of the United States added,

“Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of ‘even handled justice.’” *Poller v. Columbia Broadcasting System, supra*, 368 U.S. 464, 473, 7 L.Ed.2d 458, 82 S.Ct. 486 (1962).

And this court has held,

“If a party has a right to jury trial upon a possible issue of fact, the courts should be extremely cautious that it be not denied him. . . .

“

“In haste to dispose of a crowded calendar, a trial judge may be misled into believing a summary judgment is a quick solution for a problem. But this highly effective device should not be used as a substitute for trial on the facts and law. Especially is this true where the parties are entitled to trial by jury. It may be that plaintiff cannot win this lawsuit before a jury. The mere fact that the trial judge conceives this to be true does not endow him with authority to take the place of the jury and decide hotly contested issues of fact.” *Cox v. English-American Underwriters*, 245 F.2d 330, 332, 333 (9th Cir. 1957).

CONCLUSION

In view of the above the summary judgment (Transcript p. 75) should be vacated and this action remanded for a jury trial.

Dated at Agana, Guam, 30 August 1968.

Respectfully submitted,

TRAPP & GAYLE

By HOWARD G. TRAPP

A member of the firm,

Attorneys for appellants.

No. 22,654

United States Court of Appeals
For the Ninth Circuit

DOX W. McNAMARA and GENEVIEVE C. McNAMARA, vs. JONES & GUERRERO Co., Inc.,	} <i>Appellants,</i> <i>Appellee.</i>
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Upon Appeal from the District Court of Guam

BRIEF OF APPELLEE

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No. 22,654

**United States Court of Appeals
For the Ninth Circuit**

DON W. McNAMARA and GENEVIEVE C. McNAMARA, vs. JONES & GUERRERO Co., INC.,	}	<i>Appellants,</i> <i>Appellee.</i>
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Upon Appeal from the District Court of Guam

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of this appeal is in the United States Court of Appeals for the Ninth Circuit pursuant to the provisions of Section 1424, Title 48, USCA and Sections 1291 and 1294, Title 28, USCA, both as amended.

STATEMENT OF FACTS

On or about October 18, 1966 the appellants and appellee entered into an employment contract whereby the appellee agreed to employ the appellants on the island of Guam. (See Exhibits A and B contained in the transcript of record, said exhibits being the employment contracts). The appellants arrived on Guam and their employment began November 1, 1966.

On January 26, 1967 the appellants directed a letter to Robert Jones, General Manager for the appellee, as follows:

“Dear Mr. Jones:

Please accept this letter as our official resignation from Jones and Guerrero Enterprises, Red Carpet Steak House and Cliff Motel.

We feel our salaries can be eliminated as the first step to efficiency as it is an unnecessary expenditure. With your supervision and efficient hostesses, there is no need for this expense.

We sincerely regret this decision, which has not been a hasty one and dislike walking away from a job that has not been completed. We have never done this before but see no alternative in this instance.

We would like to be relieved of our duties at the earliest possible moment.

Regretfully,
Don W. McNamara
Genevieve C. McNamara”

(See Exhibit C, Transcript of Record.)

Thereafter the appellee filed an action attempting to recover the total sum of \$650.29, said money being the amount spent for air transportation from San Francisco to Guam. The contract of employment provides that if the employee vacates the position without the consent of the employer prior to the expiration of 12 months, he is responsible to the employer for that money expended by employer for his transportation to Guam.

Thereafter the appellants filed an answer and counter-claim. A motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure was made by the appellee and granted by Judge Shriver of the District Court of Guam, from which judgment the appellants appealed.

ARGUMENT

I. GENERAL.

From the appellants' brief, it is apparent that they do not argue that the appellee failed to prove its cause of action sufficient for purposes of Summary Judgment, but rather rely in this appeal on the fact that their affidavits show a breach of contract by appellee thereby justifying the abandonment or attempted rescission of the contract by the appellants as indicated by their letter of January 26, 1967 quoted above. It is just as apparent that they do not argue the effect of that letter; therefore, the issue seems to resolve itself down to whether the affidavit of the appellants was sufficient to raise such issue of fact as to preclude issuance of a Summary Judgment.

II. THE LAW IS WELL SETTLED AS TO THE GENERAL APPLICABILITY OF THE SUMMARY JUDGMENT PROCEDURES.

The appellee cannot and does not argue with the statement of the appellants that summary judgment is authorized only where after looking at the record

in a light most favorable to the opposing parties, it is quite clear what the truth is and there is no genuine issue remaining for trial. In fact, Judge Shriver in his decision stated:

“The Court is conscious of the fact that a motion for a summary judgment should never be granted if there is a question of material fact which remains to be determined. . . . Any allegations made must be construed most favorably to the defendants when we are dealing with a motion of this kind”.

(See pages 1 and 2 of the Transcript of the hearing on the Motion contained in the Transcript of Record.)

However, the Judge, even after construing these allegations most favorably to the appellants, stated:

“I can see no question of material fact in this case. I can see no basis whatever under which the allegations of the defendants in this case could reach a jury”.

It is equally well settled that on a motion for summary judgment the Court has discretion to disregard those facts that would not be admissible in evidence and to rely on those facts which are competent evidence. *Wimberly v. Clark Controller Co.*, 1966, 364 F. 2d 225. Further that not every issue of fact, however genuine precludes entry of summary judgment and it is only genuine issues of material fact which have that effect. *U. S. v. Device Labeled Cameron Spitler Ambloy-Syntonizer*, 1966, 261 F. Supp. 243, and a genuine issue of fact has been defined as one which can be supported by substantial competent evidence. *Taylor v. Rederi*, 1966, 249 F. Supp. 326. There-

fore, the issue in this case is whether the appellants' affidavit provides a genuine issue of material fact supported by substantial evidence so as to preclude the issuance of a summary judgment.

III. THERE WAS NO ISSUE OF MATERIAL FACT SUPPORTED BY SUBSTANTIAL EVIDENCE SO AS TO PRECLUDE THE ISSUANCE OF A SUMMARY JUDGMENT.

- a. The so-called parole evidence rule rendered inadmissible much of the evidence which the appellants purported to introduce in their affidavit.

It is again well settled that a parole condition may not be shown if it is contrary to the terms of the written contract. Fraud in the inducement by a promise made without the intention of performance may be shown by parole if the promise refers to an act not covered by the terms of the contract, but not if it is directly at variance with the terms of the evidence. (See generally *Simmons v. California Institute of Technology*, 1950, 34 C. 2d 264.)

The issues presented by the affidavit are as follows:

1. Extent of the work week in hours.
2. Extent of the work week in days.
3. Duties of the appellants.
4. That the restaurant would be operable 18 October 1966.
5. The furnishing of meals without cost.
6. The furnishing of adequate housing.
7. The furnishing of an automobile at cost to the appellants.

The contract with regard to those issues provided as follows:

1. That housing, including utilities and major furniture would be furnished by the employer at the site of the work; however, the rental and utility costs should not exceed \$125.00 per month. Any excess cost over the \$125.00 limit would be borne by the employee; conversely, should the housing and utility cost be less, then the difference would be paid to the employee. The employee was free not to live in the company housing area and in that case the full \$125.00 per month would be paid to the employee.

2. That the employee agreed to work a *minimum* of 48 hours per week.

Aside from the bare allegation that the appellee sold to appellants an automobile considerably above cost, there is no other evidence regarding this particular item and a mere statement of conclusions does not raise the required issue of fact. (See *Taylor v. Rederi*, *supra*.)

With regard to the general duties of the appellants, the alleged breach of which was relied on heavily in the affidavit, the contract provides:

“I. Assignment of work.

1. The employee shall be employed by the employer in the classification above specified, the employee expressly representing to the employer that he is fully qualified to perform said class of work. Said employment shall be in connection with any work of the employer on Guam.

2. *The employer may require the employee to render service in a classification of labor other than that mentioned above provided that the employee's salary shall not be reduced.*" (Emphasis supplied.)

With the exception, therefore, of the issue of furnishing of meals and the opening date of the restaurant, the alleged misrepresentations are all in direct conflict with the terms and conditions of the contract and therefore evidence regarding such misrepresentations would not be admissible and the Judge in his discretion was entitled to disregard those parts of the affidavit.

This is especially so in light of the paragraph contained in the contract immediately above the appellants' signatures indicating that the employee had read the agreement, fully understood its terms, certified that the terms and conditions constituted his entire agreement with the employer, that no promises or understandings or representations were made other than those stated in the agreement and that modification of the agreement might only be made by a written instrument signed by both the employee and employer.

- b. **Whatever issues sustained by admissible evidence remaining in the affidavit were as a matter of law either not sufficient to justify the breach of contract by the appellants or were, in fact, waived by appellants.**

The case of *Pasquel v. Owen*, 1950, 186 F. 2d 263, provides an excellent discussion of the question of sufficiency of non-performance to justify a subsequent breach and waiver of non-performance.

This case involved a contract to employ the appellant as a baseball player-manager.

Mr. Pasquel was removed as manager and continued playing baseball as a player for a period of time and then left the job in Mexico and returned to the United States. The Court made the determination that the promisor's lack of full performance did not justify the subsequent breach by Pasquel and further, that Pasquel had waived whatever rights he had to rescind the contract. The Court stated on page 269 of the decision:

“The contract here is specific in the matter of compensation. As has already been observed, it is not specific as to the obligations of the parties with reference to the defendant's duties . . . insofar as plaintiff was concerned, there was at most only a partial breach of the contract as he at no time failed to pay the full consideration agreed upon and following the alleged breach, the defendant made no demand of performance upon him, but so far as the plaintiff knew, defendant accepted plaintiff's performance of the contract”.

The *Pasquel* case, *supra*, is in line with the instant case in that the above quoted portions of the contract between the appellant and appellee indicate that the contract was not specific with reference to the appellant's duties; further, as in the *Pasquel* case, *supra*, the appellee never failed to pay the full consideration agreed upon and also following the alleged breach of contract the appellants made no demand of performance upon the appellee and insofar as appellee knew, the appellants accepted their perform-

ance of the contract. It is especially significant that no demand was made upon the appellee in that the contract provides that the employee agrees that if he has any claim arising out of, or in connection with, the employment, he will give written notice to the employer of such claim and that he will not institute any suit or action against employer prior to three months after filing a written notice of the claim.

The *Pasquel* case, *supra*, quoted *Pickens County v. National Surety Co.*, 4 Cir; 13 F. 2d 758, 761:

“ ‘To permit abandonment, it is necessary that the failure of the performance go to the substance of the contract. 13 C.J. 657.

Before partial failure of performance of one party will excuse the other from performing his contract, or give him right of rescission, the act failed to be performed must go to the root of the contract. 6 R.C.L. 1014; *Chamberlain v. Booth & McLeroy*, 135 Ga. 719, 70 S.E. 569, 35 L.R.A.; N.S. 1223’ ”.

The *Pasquel* case, *supra*, went on to state:

“Ordinarily strict compliance with every specification of a contract is not of its essence unless made so by the terms of the contract itself or by necessary implication, and where one party has received and retained the benefit of substantial payments by the other party, he cannot retain the benefit and repudiate the contract, but in order to warrant an abandonment, the partial failure to perform must go to the very root of the contract. *Tichnor Bros. v. Evans*, 92 V.T. 278, 102A. 1031, L.R.A. 1918 C, 1025”.

The *Pasquel* case, *supra*, stated that the employer's lack of full performance was not sufficient to justify the abandonment of the contract by the employee. The Court further ruled against the employee on the grounds of *waiver* as they stated:

“Certainly strict and full performance of a contract may be waived by either of the parties and where one party entitled to strict performance waives such performance, there can be no damages for the failure to perform strictly, neither can there be a right in the party so waiving strict performance to abandon the contract. It is said that any act indicating an intention to continue under the contract will operate as a conclusive election. (Citations.) Here after the alleged breach, defendant not only continued under the contract, but plaintiff paid compensation due under the contract. This action showing that the contract was deemed to be a subsisting agreement after the alleged default. (Citations.)”

See also re waiver: *Knutson v. Slab Form Co.*, 1942, 128 F. 2d 408. Rehearing denied 130 F. 2d 200 and *Jauch v. Powertown Tire Corp.*, 1925, 209 N.Y.S. 16, citing *Littlejohn v. Shaw*, 159 N.Y. 188, 53 N.E. 810, which stated:

“It is a general principle that where a party to a contract refuses to fulfill and bases the refusal upon a particular ground, clearly and deliberately stated, all other objections are deemed waived”.

There is no indication in the appellants' affidavit in the instant case that they complained to the appellee of the alleged non-performance; there is no

argument but that the appellee continued to make the payments to the appellants as required by the contract and that the appellants continued to work. The letter of January 26, 1967 sent to the appellee by the appellants clearly indicates that they were not leaving because of the later alleged breach, but rather that they were leaving of their own free will. This is further substantiated when the complaint of the appellee and the answer of the appellants are read together. The complaint indicated that the defendants-appellants agreed to reimburse plaintiff-appellee said balance of money expended for transportation, but defendants did not pay as agreed. The appellants' answer referred to that agreement to pay stated:

“On or about 27 January, 1967 and after the making of the agreement set forth in the amended complaint, but before any breach by defendants thereof, it was mutually agreed by plaintiff and defendants that said agreement should be rescinded.”

It is apparent therefore that after the appellants sent their letter to the appellee, they agreed to make the payments to reimburse the appellee for their transportation costs, but later decided to rescind even that agreement. To enter into an agreement such as this after the appellants terminated their employment leads to no other conclusion but that the appellants decided to leave on their own accord and not because of any breach by the appellee.

CONCLUSION

It is submitted that whatever genuine admissible issues of fact were raised by the appellants' affidavit, they were not sufficient to justify the breach by the appellants and furthermore, that the appellants by their failure to object waived their right to rely upon such non-performance; further, that by their letter of January 26, 1967 waived their right to rely on such evidence and it is respectfully submitted that the summary judgment issued in this case be affirmed.

Dated, Walnut Creek, California,
November 22, 1968.

Respectfully submitted,
JOHN J. CARNIATO,
ARRIOLA, BOHN & DIERKING,
Attorneys for Appellee.

No. 22656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

On June 22, 1966 the Grand Jury returned an indictment against the Appellant Shenandoah Rachel Morales. The indictment contains four counts. Count one charges Appellant with knowingly importing a narcotic drug, heroin, into the United States contrary to Title 21, United States Code, Section 173. Count two alleges that Appellant knowingly concealed, and facilitated the transportation and concealment of a narcotic drug, heroin, which had been imported contrary to Title 21, U.S. Code, Sec. 174. Counts three and four allege the same offenses in regards to a narcotic drug, cocaine. All the offenses were alleged to have been committed on May 24, 1966.

The indictment was returned and Appellant pleaded not guilty thereto. A jury having been waived, the cause came to trial on Oct. 20, 1966 before the Honorable Fred Kunzel and Appellant was found guilty of

all four counts. Appellant's motion to suppress the evidence was denied.

Appellant filed a timely notice of Appeal on Dec. 9, 1966 and has brought up the complete record and all the proceedings to be reviewed by this Court.

Statement of Jurisdiction.

This is an appeal from the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in the indictment returned on June 22, 1966 following a trial by the court. The judgment of the court was entered on October 20, 1966. The Clerk's and Reporter's Transcripts constitute the record for this appeal.

The jurisdiction of the court is invoked under 28 U.S.C. §1291 and 28 U.S.C. §1294 (1).

Statement of the Facts.

On May 24, 1966, United States Customs Agents at San Ysidro, California were contacted by an informer from Tijuana, Mexico. The informer stated that he had observed a certain vehicle parked in a driveway adjacent to a house in which an alleged narcotics dealer resided [R. T. 66]. The informer neither stated that he knew who owned the vehicle nor that he had seen anyone operating or occupying it, but just that it was parked next to the house [R. T. 70]. Based upon this information, a supervising officer at the San Ysidro station concluded that the occupants of the vehicle—not the vehicle itself—would be carrying contraband [R. T. 71]. He consequently posted a "look-out" for the automobile [R. T. 66]. No arrest or search warrants were obtained by the officers [R. T. 72].

Later in the afternoon of the same day, the vehicle was seen by a customs agent in an inspection line at San Ysidro [R. T. 3]. The driver was ordered to drive the automobile out of the line and to an inspection area [R. T. 6]. The defendant was an occupant of the automobile. The defendant and her two male companions were instructed to exit the vehicle and to proceed to the office for "further inspection" [R. T. 12]. The defendant was not informed of her constitutional rights by the officers, nor was she arrested [R. T. 12].

After entering the office, the defendant was subjected to a "personal search" [R. T. 17], by a female "seizure clerk" [R. T. 14]. The defendant was ordered to disrobe, whereupon her clothing was searched. No narcotics were found among the articles of her clothing [R. T. 17]. Notwithstanding this fruitless search, the clerk instructed the defendant to bend over and expose her vaginal area. In conducting the examination, the medically untrained clerk [R. T. 16] thought that she observed an object "sort of like a bubble" protruding from the vagina [R. T. 20]. The defendant was requested to remove the object; however, she refused and asserted that such an object was not present [R. T. 22].

The defendant was then taken to a physician who examined her to ascertain whether she was under the influence of narcotics, had used them within a recent period, and if any contraband was concealed in a body cavity. Upon his examination of her pupils and limbs, the doctor ascertained that she was neither under the influence of drugs nor had any needle marks [R. T. 39, 41]. Even though she appeared to be in normal physical condition, the physician examined the defend-

ant's vagina wherein he found four packets containing heroin and cocaine [R. T. 35-6, 63]. Never during this period was the defendant informed of her constitutional rights or officially arrested.

Specification of Error.

The defendant was subjected to an unwarranted search of her person because the inspecting officers had neither a strong suspicion that she possessed narcotics nor a clear indication that a visual examination of her vagina would reveal such contraband.

Question Presented.

Whether an individual can be subjected to an embarrassing, undignified and intrusive search of her body cavities where investigating officers have no basis beyond conjecture to believe that she has concealed contraband within her person.

ARGUMENT.

I.

The Border Search Exception to the Fourth Amendment Cannot Be Used to Justify an Extremely Intrusive Search of the Human Body Where No Reasonable Cause to Search Exists.

A. The Rationale Underlying the Exception Does Not Contemplate Such Unconscionable Conduct.

Generally, police are empowered to make searches only under a valid search warrant issued by a judicial officer on probable cause. Searches made at the borders of the United States have been traditionally excepted from the application of the Fourth Amendment. *Boyd v. United States*, 116 U.S. 616 (1886). Authorization for “border searches” by customs agents upon suspicion only is set forth specifically by statute and has been allowed by the courts. 14 Stat. 178 (1886), 19 U.S.C. §482 (1964); *Cervantes v. United States*, 263 F. 2d 800 (9th Cir. 1959). The purpose usually articulated for allowing such an exception is

“because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in”. *Carroll v. United States*, 267 U.S. 132 (1925).

Border searches were originally searches of a person’s clothing and luggage. Therefore, allowing indiscriminate searches was deemed within the public interest because of the necessity of enforcing the customs law and of the minor invasion of privacy.

Today, however, customs officials conduct the most degrading and humiliating searches of body cavities under the guise of border searches. Congress certainly

did not have such searches in mind when the statutes were enacted for they speak only of “vessels”, “vehicles”, “baggage”, “envelope”, “merchandise”, and the like. 19 U.S.C. §§482, 1581-82. The difference between permitting a minor official to search a handbag and allowing him to perform the most thorough and degrading search of a person’s body is considerable.

In view of the extremely intrusive nature of these searches, the public interest demands greater protection for the people of this nation. In short, suitcases and citizens cannot be treated similarly.

B. Decisional Law Does Not Support Such Humiliating Searches in the Absence of Reasonable Cause.

The thrust of the appellant’s argument is that even though mere suspicion can justify the searching of physical possessions, it cannot justify requiring a citizen to disrobe and to submit to an examination of his body, albeit just a visual inspection. More is required to warrant an abrogation of the Fourth Amendment’s protection of personal privacy and basic dignity.

The judicial decisions involving intrusive searches display a concern for the right to remain free from such searches. In *Blackford v. United States*, 247 F. 2d 745 (9th Cir. 1957), the defendant’s rectum had been probed in an attempt to discover and remove contraband narcotics. The court held that use of the anal probe had not violated the Fourth Amendment because the officers had followed proper medical procedure, had used only slight force, and had “precise knowledge of what and how much was where”. *Id.* at 752. Moreover, Blackford was not examined until after he was arrested based upon probable cause. *Id.* at 749.

In *Murgia v. United States*, 285 F. 2d 14 (9th Cir. 1960), the court ruled that the search of the defendant's body cavity was not violative of the Fourth or Fifth Amendments, as it was performed incident to a border search. But, the facts of this case also indicate that there was probable cause to search: The defendant and his companions were riding in a car from which an "addict's kit" had been thrown; he was not only arrested before the search, but had voluntarily consented to it; and, finally, another defendant confessed to smuggling drugs and implicated Murgia.

In *Blefare v. United States*, 362 F. 2d 870 (9th Cir. 1966), an emetic was forceably administered to the defendant to induce regurgitation. The defendant vomited two packets of heroin after ingesting the emetic. The Ninth Circuit affirmed his conviction for narcotics smuggling, holding that the heroin was not the product of an unreasonable search and seizure. However, as in *Blackford* and *Murgia*, the officers had grounds for conducting the search since Blefare had admitted to Canadian authorities that he had previously smuggled heroin across the border from Tijuana in his stomach. He also stated that he and others were aware of the rectal probes and were swallowing heroin to avoid them. All this information had been relayed to the arresting officers before Blefare had been detained. In addition, officers found that Blefare's arms were heavily marked with needle marks which indicated recent use of narcotics. *Id.* at 871.

The facts of *Blackford*, *Murgia*, and *Blefare* indicate that if probable cause did not exist, at least there were suspicious circumstances indicating that the defendants had concealed contraband within their bodies.

Although border searches arguably may be made on suspicion alone, they must be conducted in a reasonable manner. In this respect they are similar to ordinary searches. Reasonableness within the context of a border search has been defined variously by the courts. The opinion in *United States v. Mitchel*, 158 F. Supp. 34 (S.D. Tex. 1957), *aff'd sub. nom.* 258 F. 2d 754 (5th Cir. 1958), stated that the search must be "reasonable in scope and extent. An officer making a valid search must not resort to overly rigorous or drastic means." *Id.* at 36. This decision places a limit upon the extensiveness and intensiveness that may be used in a border search. The *Mitchel* court further ruled that a search would be reasonable "only if the circumstances warrant a search initially". *Id.* at 36. The court ostensibly intended that there be a good reason for conducting a search even if the circumstances do not constitute probable cause.

The United States Supreme Court has considered intrusive non-border searches of the body in two cases. The first is *Roachin v. California*, 342 U.S. 165 (1952), wherein the Court found that the petitioner's right to due process had been violated when police took him to a hospital where a doctor forced a tube down his throat to induce vomiting. The Court found that the conduct was such that "shocks the conscience". *Id.* at 172.

The second case is *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the Court articulated a standard which is designed to protect the "interests in human dignity and privacy" in cases that do not exhibit the aggravated circumstances of *Roachin*. *Id.* at 769. The Court sustained in California blood sample statute but solely because there was a "clear indication"

that the evidence would be found before the search was made. *Id.* at 770. The emphasis of the Court on the requirement that an officer have a clear indication that the search be successful appeared to interject a test similar to probable cause into the realm of intrusive border searches.

The most recent decision which is dispositive of the issue in this case is *Henderson v. United States*, Circuit Court of Appeals Case No. 21,190 (9th Cir. 1967). *Henderson*⁴ represents an application of the clear indication rule to border searches and a recognition that in preceding border search cases officers had acted upon information approximating probable cause.

The defendant in *Henderson* was detained upon attempting to cross the border because of a suspicion entertained by a customs officer which was based upon an erroneous recollection. Mrs. Henderson was forced to disrobe and submit to a visual examination of her body. When asked to expose her vagina, she became uncooperative. The inspecting agent concluded that Mrs. Henderson was concealing something in her vagina. She was subsequently taken to the office of a medical doctor whereupon an examination was conducted which revealed that packets of heroin had been secreted in her vagina.

The initial question for the court was whether the clear indication standard promulgated in *Schmerber* applied to an examination, rather than an invasion, of a person's body. The court noted that although *Schmerber* was directed to a physical penetration "its implications are broader" because the decision "emphasizes that the purpose of the Fourth Amendment is 'to protect personal privacy and dignity against unwarranted intru-

sion by the state.’ ” *Id.* at 3. Based on the underlying rationale of *Schmerber* the court held that the requirement extends to border searches. *Id.* at 3.

The Court then ruled that the physical examination was unwarranted as it was based upon mere suspicion. The opinion noted that the incriminating circumstances of *Blackford*, *Blefare*, and *Murgia* were absent. *Id.* at 5. The judges distinguished between searches of possessions and searches of the body, and hence set forth the different requirements that justify such searches:

“Thus every person crossing our border may be required to disclose the contents of his baggage, and of his vehicle, if he has one. The mere crossing of the border is sufficient cause for such a search. Even “mere suspicion” is not required. . . . If, however, the search of the person is to go further, if the party, male or female, is to be required to strip, we think that something more, at least a real suspicion, directed specifically to that person, should be required. And if there is to be a more than casual examination of the body, if in the course of the search of a woman there is to be a requirement that she manually open her vagina for visual inspection to see if she has something concealed there, we think that we should require more than a mere suspicion. . . . Surely, in such a case to be warranted, the official’s action should be backed by at least the ‘clear indication’ . . . required in *Schmerber*. . . .” *Id.* at 4. See also *Rivas v. United States*, 368 F. 2d 703 (9th Cir. 1966).

As is stated above, a casual examination can be justified only if customs agents have a real suspicion di-

rected specifically to the person who is required to disrobe. If there is to be a visual inspection of the vaginal area that requires the assistance of person being examined there must be a clear indication that the search will be successful. The facts of this case demonstrate that neither test was satisfied.

II.

The Conviction Must Be Reversed Because the Defendant Was Subjected to an Unwarranted Search Since Neither Reasonable Grounds to Believe That She Possessed Narcotics Existed nor Was There a Clear Indication That the Search Would Be Successful.

A. The Defendant Should Not Have Been Required to Disrobe Because There Were No Circumstances Upon Which the Officers Could Reasonably Entertain a Real Suspicion That She Possessed Narcotics.

A consideration of the case at bar shows that there was no basis beyond patent conjecture that the defendant had secreted narcotics in her vaginal cavity.

First, there were no suspicious circumstances leading to an arrest of the defendant before the search as in *Murgia* where the defendant attempted to dispose of a hypodermic kit, or as in *Blefare* where the defendant had previously told other reliable enforcement authorities that he smuggled drugs by ingesting the containers in which they were placed. To the contrary, the unidentified and so-called "reliable informer" [R. T. 66] in this case merely said that an automobile was parked near the residence of an alleged narcotics dealer [R. T. 67]. He did not relate to the customs authorities that he knew who owned the vehicle, that he had never seen it before, or that he had seen anyone going to or from

the car or operating or occupying it [R. T. 70]. Clearly, there was no basis upon which the customs agents could rationally conclude that the *occupants* of the automobile would be carrying contraband [R. T. 71].

Second, the search did not occur subsequent to a lawful arrest as in the *Blackford* and *Murgia* cases.

Third, the officers had not been informed of “what and how much was where” as in *Blackford*. Nor did a co-defendant’s confession guide them to the location of the drugs. No specific information was obtained prior to the search that Shenandoah Morales had hidden heroin and cocaine in her vagina, nor in anyway connected to the alleged narcotic dealer.

In conclusion, there were no circumstances that justified requiring the defendant to disrobe to submit to a casual examination of her body.

B. The Defendant Should Not Have Been Required to Submit to a Visual Examination of Her Vagina Because There Was No Clear Indication That the Search Would Be Successful.

The fourth consideration involves a compendium of the three factors above coupled with an application of the *Henderson* standard. The requirement of a clear indication that evidence would be found is intended to protect a citizen’s privacy by insuring that only those searches in which there is a high probability of success will be sanctioned. The standard was violated in this case.

It is unquestionable that no *clear* indication existed that the defendant had concealed narcotics within her person before she was requested to expose her vagina for a visual examination. By that time, the seizure

clerk had examined her clothing and found no narcotics. Nor was there such an indication by the time the doctor inserted a speculum into her vagina, because an examination of her eyes and limbs showed that she was not under the influence of drugs and had not received an injection within a recent period.

Conclusion.

For the reasons stated above, the appellant respectfully submits that the judge be reversed.

NORMAN J. KAPLAN,

Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN



NO. 22656

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FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
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SHENANDOAH RACHEL MORALES,

Appellant,

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APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in all counts of a four-count indictment, at the conclusion of trial without a jury [C.T. 2-5, 12, 17].^{1/}

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291

^{1/}
"C.T." refers to the Clerk's Transcript of Record.

and 1294.

II.

STATEMENT OF THE CASE

Appellant was charged in all counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant knowingly imported and brought approximately 4-1/2 ounces of heroin, a narcotic drug, into the United States from Mexico, contrary to Title 21, United States Code, Section 173 [C.T. 2].

Count Two charged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately 4-1/2 ounces of heroin, a narcotic drug, knowing that it had been brought into the United States contrary to law [C.T. 3].

Count Three charged the smuggling of approximately one-fourth of an ounce of cocaine, a narcotic drug. Count Four charged the concealment, etc., of the same quantity of cocaine [C.T. 4-5].

Appellant waived the right to trial by jury. Court trial of appellant commenced on October 20, 1966, before United States District Judge Fred Kunzel. On the same date, appellant's motion to suppress evidence was denied, and she was found guilty as charged upon all counts [C. T. 11, 17].

Thereafter, on December 9, 1966, appellant was committed to the custody of the Attorney General for five years upon each count, to run concurrently [C.T. 23].

Appellant filed a timely notice of appeal from the judgment upon Counts

One and Two [C.T. 24].

III.

ERROR SPECIFIED

Appellant specifies two points upon appeal, both of which involve the same issue, which is the reasonableness of the visual inspection of appellant by a female Customs employee at the international border.

IV.

STATEMENT OF THE FACTS

On May 24, 1966, Customs Agent Walter Gates placed a "look-out" for a vehicle in which appellant was an occupant when it subsequently entered the United States from Mexico on the same date [R.T. 3-4, 65-66].^{2/}

A "look-out" is placed by the Customs Service with inspectors on the primary inspection areas at the border [R.T. 6-7].

Before placing the "look-out," Agent Gates received information from an informant. This informant had provided reliable information in the past [R.T. 66].

The informant told Agent Gates that he had seen the vehicle in question, parked in the driveway of the Tijuana, Mexico, residence of Flattop. Flattop was a lieutenant of Tony Sanchez, a narcotic dealer [R.T. 67].

When the vehicle entered the United States from Tijuana, Mexico, on May 24, at San Ysidro, California, it was occupied by appellant and two boys [R.T. 3-4, 15]. An immigration inspector noticed that the vehicle was on

"look-out" and directed the vehicle to the secondary inspection area. A female Customs employee, June Genesta, conducted a search of appellant in a small room which had no windows [R.T. 2, 6, 13-14, 16].

During the search, appellant was requested to remove her clothing, spread her legs, bend over, and to spread her buttocks [R.T. 17, 19-20]. Agent Gates testified that female narcotic violators or smugglers will carry narcotics in a body cavity or in the stomach, although brassieres and purses are sometimes used [R.T. 72].

Appellant complied with the instructions, and Miss Genesta observed a small white rubber balloon as it protruded from appellant's vagina [R.T. 20].

Miss Genesta asked appellant to remove the object, but appellant refused, stating that nothing was there. Miss Genesta repeated the request several times and informed appellant that she had seen it and knew that it was there, but appellant insisted that nothing was there [R.T. 15].

Miss Genesta then stated, "Well, you will be taken to a doctor in any event who will remove it." Appellant replied, "Let them take me to a doctor. There's nothing there." [R.T. 15].

Miss Genesta did not touch appellant during the visual search [R.T. 17].

Appellant was taken to the office of Dr. Paul R. Salerno, located about 15 miles from the international border [R.T. 33-35, 58]. Dr. Salerno was a physician licensed to practice medicine in the State of California [R.T. 34].

Dr. Salerno removed four rubber-enclosed packets from appellant's vaginal cavity. This was accomplished in a medically-approved manner

under sanitary conditions. There was no violence [R.T. 35-36, 56-57].

The packets weighed approximately five ounces and contained heroin and cocaine [R.T. 36, 63]. There was no search warrant or warrant of arrest up to that time [R.T. 72].

V.

ARGUMENT

A. THE VISUAL INSPECTION OF APPELLANT BY A FEMALE CUSTOMS EMPLOYEE CONSTITUTED A REASONABLE BORDER SEARCH.

Appellant does not question the validity of the second search and removal of the narcotics from her vagina by Dr. Salerno. There would be no basis for an attack upon this second search, since it had previously been determined that an object was hidden in appellant's vagina. This Court has stated:

"There is nothing in the Bill of Rights which makes body cavities a legally protected sanctuary for carrying narcotics."

Blackford v. United States, 247 F.2d 745, 753 (9th Cir. 1957).

In Henderson v. United States, 9th Cir., No. 21,190, July 7, 1967, the Court implied that vaginal cavities are not immune from search under appropriate circumstances.

In People v. John Martin Gunaca and Josephine Paz Macias, Crim. No. 9780, April 26, 1965, the District Court of Appeals of the State of California, Second Appellate District, in an unpublished opinion, upheld the action of

officers in taking a female defendant to a jail, where she was inspected in the nude by female deputies, and then to a hospital, where a doctor and two nurses removed heroin from her vagina. The United States Supreme Court denied certiorari in that case on January 17, 1966.

Macias v. California, 382 U. S. 993 (1966).

However, appellant objects to the mere visual inspection, not to the final search and removal of the narcotics.

The visual inspection of appellant by Miss Genesta involved no physical contact with appellant's body [R.T. 17]. It was an examination of a female suspect by another female who was employed by United States Customs. The search followed appellant's entry into the United States, so it was a Customs border search.

A border search requires no probable cause.

Rivas. v. United States, 368 F.2d 703, 709 (9th Cir. 1966);

Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966);

King v. United States, 348 F.2d 814, 817 (9th Cir. 1965), cert. denied, 382 U.S. 926 (1965).

However, in Rivas, supra, this Court applied a special test to body cavity border searches, requiring a "plain suggestion" that contraband has been smuggled (Rivas, supra, at p. 710). In Henderson, supra, this "plain suggestion" test was applied, by the majority opinion, to a visual vaginal inspection. The Rivas-Henderson test was based upon Schmerber v. California, 384 U.S. 757 (1966). Rivas and Henderson involved an extension of

Schmerber, as Schmerber was concerned with the extraordinary circumstances of forcibly breaking into a suspect's body and penetrating the skin in order to remove blood. However, the search that was successfully challenged in Henderson involved a visual inspection, not a physical penetration into the body.

In an earlier decision, this Court rejected an appellant's complaint that she had been viewed in an unclothed state by a female Customs employee:

"Appellant likewise urges that she was required to strip herself of all her clothing at the time she was searched. Such a search is frequently necessary."

Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961), cert. denied, 366 U. S. 950 (1961).

The visual inspection of appellant was based upon information provided by an informant who had previously proved to be reliable [R.T. 66-67]. The trier of facts held that Agent Gates received information regarding the location of an automobile in the drive-way of a known lieutenant of a narcotic dealer and that:

"the reasonable inference would be that the persons who owned the car or were driving the car had something to do with narcotics, so he would not be doing his duty if he didn't post a look-out for the automobile and certainly they then had the right, because of this suspicious circumstance, to search the people that were in the automobile and they conducted a proper search of this defendant. It was

a reasonable search under the circumstances." [R.T. 74].

This finding by the experienced trial Judge is entitled to considerable weight. Another factor of great importance in this appeal is the existence of the information provided by the reliable informant. Henderson, supra, believed to be the only published appellate opinion on the subject of vaginal searches, emphasizes the importance of the type of information that is present here and was lacking in Henderson:

"Appellant [Henderson] crossed the border in an automobile driven by one Banks. The customs officers had not received any information in relation to the car or to Banks or to appellant that would alert them to the possibility that they might be carrying narcotics. Such information did exist in Denton, Blefare and Witt, supra, n. 1."

This Court has stated that between 18% and 20% of the international traffic in narcotics in this area is conducted by smuggling in body cavities. Blackford, supra, at p. 752.

It is respectfully submitted that the ruling of the trial Court properly resolved the question of balancing the interests of protection of the international borders, against the interests of society in deterring unwarranted searches based upon mere whim or caprice.

VI .

CONCLUSION

For the foregoing reasons , it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

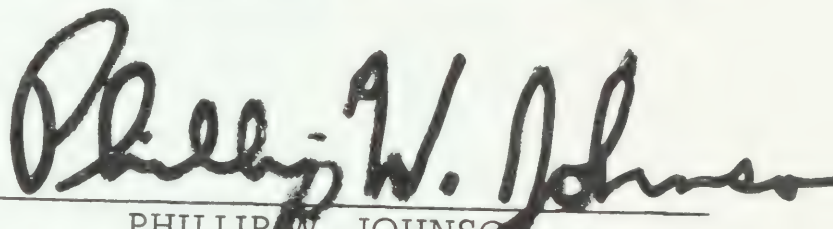
EDWIN L. MILLER, JR.,
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Assistant U.S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON
Assistant U. S. Attorney

No. 22656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

MAY 15 1968

WM. B. LUCK, CLERK

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No. 22656
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

The Conviction Must Be Reversed Because the Customs Officials Failed to Comply With the Standards Recently Promulgated to Regulate Intrusive Border Searches.

Counsel for Appellee correctly states in his brief that vaginal cavities are not immune from search under appropriate circumstances. The question raised here is which circumstances are appropriate to justify such a search. The argument posed by Appellee is essentially that the information provided by an undisclosed informer was sufficient to justify the search in this case. The argument lacks force for three reasons: first, the information supplied could only justify searching defendant's personalty; second, the information was not

adequate to justify causing defendant to remove her clothing; third, even assuming the information was adequate enough to justify forcing defendant to disrobe, it was not sufficient to justify compelling her to manually expose her vagina to the seizure clerk.

Before discussing the arguments of Appellee, it is necessary to state the three tests recently propounded in *Henderson v. United States*, Circuit Court of Appeals Case No. 21,190 (9th Cir. 1967). These tests regulate the permissible extent of border searches. The standards vary in stringency depending upon the severity and intrusiveness of the search. The initial standard provides that the mere crossing of the border is sufficient cause for search of a person's baggage and vehicle. The second standard prescribes that if a person is required to disrobe the investigating officers must have "at least a real suspicion directed specifically to that person." *Id* at 4. The last and strictest standard requires in a case comparable to the instant one that there be a "clear indication" that the search will reveal the evidence sought before a woman can be compelled to manually open her vagina for visual inspection.

Under these tests it is unquestionable that the officers were justified in searching the automobile in which defendant was an occupant. However, they were not justified in proceeding further and forcing defendant to disrobe because the facts were not such as to give rise to a "real suspicion" directed *specifically* at defendant that she was carrying contraband. The most infor-

mation the officers were given was that a vehicle which defendant later occupied was parked next to the residence of an alleged lieutenant of a narcotics dealer. No information was given that defendant was seen in the automobile or the house, or that she would be attempting to smuggle narcotics through the port of entry, nor that she was in anyway connected to the occupants or residents of the premises indicated.

On this point Appellee argues that the instant case is distinguishable from *Henderson*. The government asserts that the kind of information necessary to justify an intrusive search of a body cavity was absent in *Henderson* but present here. This is not a salient argument. The court in *Henderson* pointed out that the customs officers had not received any information about the automobile in which the defendant was riding, the driver, or the defendant. The only difference between the cases is that here the automobile had allegedly been seen by an undisclosed informer. Nonetheless, this is still not sufficient information to generate a real suspicion directed specifically toward defendant that narcotics were being smuggled across the border by her. It—at most—would substantiate a search of the vehicle and baggage. Therefore, defendant should not have been required to disrobe.

Even assuming that the facts were sufficient to justify requiring defendant to disrobe, they were inadequate to create a clear indication to the seizure clerk that defendant had secreted drugs and that the search would

disclose them if she were made to expose her vaginal cavity. The clear indication test means that there must be a high probability that the search will be fruitful before it can be conducted. It is axiomatic that no high probability of success existed in the case at bar. No specific information was obtained prior to the time defendant was forced to disrobe that she had concealed narcotics in her person. Moreover, by the time defendant was requested to expose herself, the seizure clerk had conducted an examination of defendant's person and clothing and had found nothing. This singular lack of evidence, contrary to Appellee's position, should have vitiated any prior suspicions the officers had. Nothing beyond caprice existed upon which to base such a humiliating search.

Respectfully submitted,

NORMAN J. KAPLAN,
Attorney for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN

NO. 22658

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES R. THOMAS,

Appellant,

MAR 28 1969

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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MAR 24 1969

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES R. THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES R. THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On June 10, 1964, defendant was indicted in two counts by the Federal Grand Jury for the Southern District of California for two armed robberies of National Banks netting over \$9,000 by the use of .45 automatics in violation of Title 18, United States Code, §2113(a) and (d) [C. T. 2]. ^{1/} On June 26, 1964, Thomas filed a Petition to Enter Plea of Guilty [C. T. 6], and on that date entered a plea of guilty to Count One of the Indictment [C. T. 10]. On

1/ "C. T. " refers to Clerk's Transcript.

August 4, 1964, the Honorable Albert Lee Stephens, Jr., United States District Judge, sentenced Thomas to the custody of the Attorney General for the maximum period provided by law and for a study as described in Title 18, United States Code, §4208(c) [C. T. 11].

On June 12, 1967, Thomas filed a Motion to Vacate and Set Aside Judgment and Plea of Guilty [C. T. 19] after Judge Stephens said on June 5, 1967 that the report from the Bureau of Prisons recommended a twenty-five year sentence pursuant to §4208(a)(2) of Title 18, United States Code [R. T. of June 5, 1967].^{2/}

On August 7, 28, 29 and 30, 1967, hearings were held on the motion to withdraw the plea, and on August 30, 1967, Judge Stephens denied the motion [R. T. 375-385].

On September 21, 1967, Thomas was committed to the custody of the Attorney General for twenty-five years pursuant to Title 18, United States Code, §4208(a)(2) [C. T. 57].

On October 2, 1967, eleven days after the Judgment was entered, defendant filed a Notice of Appeal [C. T. 59].

On June 4, 1968, Judges Merrill and Koelsch dismissed the appeal for want of prosecution. On June 28, 1968, Judges Merrill and Koelsch reinstated the appeal.

The District Court had jurisdiction under the provisions of

^{2/} "R. T. " refers to Reporter's Transcript and in this case to part of the Transcript which will be supplemented.

Title 18, United States Code, §§2113(a) and (d), and 3231, and Rule 32(d) of the Federal Rules of Criminal Procedure.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, §§1291 and 1294.

II

STATEMENT OF FACTS

On June 10, 1964, defendant Thomas was indicted for two armed bank robberies [C. T. 2]. On June 26, 1964, defendant appeared with retained counsel William J. Bluestein and entered a plea of guilty to Count 1 and not guilty to Count 2 [C. T. 10]. At that time defendant filed a Petition to Enter Plea of Guilty [C. T. 6], and in response to questions from Judge Albert Lee Stephens, Jr., replied he had read the petition to enter a plea and understood it; he understood the maximum penalty; he had not been promised any leniency or special kind of sentence; he had not been approached with promises to plead guilty; he had received no threats; he had told his attorney all facts surrounding the indictment; his tendered plea was a free and voluntary act; and he had no questions about the contents of the plea form [R. T. Supp. of 6/26/64, pp. 17-18; R. T. 188189].

On August 4, 1964, Judge Stephens imposed a maximum sentence and committed Thomas for a study as authorized by Title 18, United States Code, §§4208(b) and (c) [R. T. Supp. 24-25; C. T. 11].

Practically three years later, on April 11, 1967, Thomas was returned to the Court and the matter was continued to April 19 [R. T. Supp. pp. 28-29].

On April 21, 1967, defendant appeared with William Bluestein and the representation was made that Thomas wanted a delay to prepare some unspecified motions [R. T. Supp. 32]. On May 15, 1967, Thomas appeared with appointed counsel Bernard G. Winsberg, dismissed his counsel, was aware of the pre-sentence report, and stated that he had affidavits to prove his plea was "onerous" [R. T. Supp. pp. 37-39].

On June 5, 1967, Thomas appeared in pro per and was specifically informed of what sentence the Judge had in mind, twenty-five years pursuant to Title 18, United States Code, §4208(a)(2) [R. T. Supp. p. 50]. At that time Thomas informed Judge Stephens that his wife had obtained affidavits "from a lawyer and from other officials" [R. T. Supp. pp. 51-52], and he "refuse[d] to accept sentence . . . "[R. T. Supp. p. 53].

On June 12, 1967, Thomas filed a Motion to Vacate and Set Aside Judgment and Plea of Guilty [C. T. 19]. In said Motion, Thomas alleged, under oath, that while under the influence of narcotic drugs in the County Hospital, the FBI told him he could avoid prosecution by the State for kidnapping by pleading guilty to a bank robbery and convincing the FBI of his guilt. There is further alleged that Bluestein told him that the FBI and state officials said the local charges would be dismissed if Thomas was convicted of bank robbery in the Federal Court. Thomas further

alleged the FBI returned to reiterate the "deal". Thomas alleged that both the "Federal Agents" returned and said that only the State judge could dismiss the charges and it would be done. The conclusion is alleged that without the promises of the FBI he would not have plead to the Federal charge.

From August 28 to 30, 1967, Judge Stephens held an evidentiary hearing relative to the allegations made by Thomas, as embellished on August 7, 1967. Said embellishments were that he was under the influence of narcotics at the times of interrogation and plea, Bluestein was incompetent, and he was never advised of his rights.

Dr. Tennison S. Dong, M. D., testified that he specializes in general surgery and at the time of testifying was employed by the Los Angeles Sheriff's office, assigned to the Narcotics Division [R. T. 271]. After Thomas left the hospital for his gunshot wounds May 31, 1964 [R. T. 277], he was not addicted to drugs [R. T. 282], and received no narcotics [R. T. 282]. After Thomas left the hospital he was normal in his mental state [R. T. 284]. Any medicine he took after May 31 would have no effect "on the state of mind, his consciousness or thinking process" [R. T. 284]. No medication was received on the date of plea (June 26, 1964) [R. T. 294-95], and there was no effect on Thomas' mind from medicine or drugs on that date [R. T. 297].

The claim of Bluestein's incompetence was withdrawn [R. T. 91-92].

With respect to the advising of rights by interviewing

agents of the FBI, it is noted that each agent who testified related that Thomas was advised of his rights by the witness or his accompanying Special Agent, and the Court so found [R. T. 21, 252, 310, 315, 341, 376].

Summing up Thomas' testimony at the hearings he said that he only pleaded guilty in the Federal Court because his attorney told him that the State would dismiss its charges if he plead guilty to the Federal charges. Although Thomas said various State and Federal agents made such representations to him, those agents known to have dealt with Thomas all denied it [Testimony of Crowe, Mullen, Morneau, Schlatter, Tuggy, Jones, and Sellars]. In essence, Thomas' testimony may be summarized by his own words, at R. T. 170:

" . . . I am going to say anything as long as I am getting what I thought I was gonna get out of it "

Thomas' attorney, at the time of the plea, testified. At R. T. 61, Bluestein testified that the outcome of the Federal proceeding had no effect on the District Attorney's Office. Bluestein testified, at R. T. 68-69, that any promises made to Thomas in the State court "took place after the plea was entered in this (Federal) case " Further, Bluestein testified that he never told Thomas that the State charges would be dismissed for a guilty plea to the Federal charge [R. T. 73-74]. Bluestein was certain that any arrangement with the District Attorney was

not "connected in any way upon his plea of guilty in this court. "
[R. T. 79.]

At the conclusion of Bluestein's testimony he stated his opinion that Thomas would not have plead guilty in the Federal Court without "the deal" he (Bluestein) made with the District Attorney [R. T. 87-88].

It is noted, that even after Thomas was initially sentenced by Judge Stephens he nevertheless, entered a plea of not guilty in the State court which was eventually changed to guilty on January 7, 1965 [Exhibits 3, 8].

As Judge Stephens found, at R. T. 383, Thomas' plea in Federal Court was entered because he wanted the leverage of a long sentence in his plea to the State court for a light sentence, that he committed the bank robbery [R. T. 381], and the plea was free and voluntary [R. T. 381].

III

QUESTION PRESENTED

Whether the District Court abused its discretion in denying the motion to withdraw a plea of guilty made nearly three years earlier and after the defendant knew what was the range of sentence in the Judge's mind.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

A motion to withdraw a plea of guilty is directed to the sound discretion of the court. Sherman v. United States, 383 F.2d 837 (9th Cir. 1967); White v. United States, 354 F.2d 22 (9th Cir. 1965); Zaffarano v. United States, 330 F.2d 114 (9th Cir. 1964).

In the instant case the subject motion was made nearly three years after the plea was entered and after the appellant was aware of the range of sentence the judge had in mind. Said factors are significant in the exercise of the court's discretion. White v. United States, supra; Pinedo v. United States, 347 F.2d 142 (9th Cir. 1965); Zaffarano v. United States, supra. It is also noted that the District Court here found that since the original defense was that Thomas felt he could not be identified, the passage of time was particularly significant [R.T. 383-84].

Although defendant recognizes that his testimony at the hearings was of negligible value, the gist of the instant appeal is that William J. Bluestein, "a respected and highly experienced" [App. Op. Br. 5] ^{3/} attorney gave the opinion that Thomas would not have entered his plea but for the State "deal". Aside from the fact that Judge Stephens gave no weight to such "opinion", it is noted that Bluestein's testimony contradicts the opinion.

^{3/} See, Glickman v. United States, 367 F.2d 562 (9th Cir. 1966) and People v. Darmiento, 243 Cal. App. 2d 358 (1966).

The main issue with which the trial court was faced was whether plea was free and voluntary. Aside from the fact that Thomas' allegations in his motion were not supported by believable evidence, the record supports the finding made by Judge Stephens that Thomas "wanted" the 25-year sentence as a lever, while misrepresenting the effect of said sentence to the State Court (Exhibit 3, pp. 3, 9, 10, 13).

Defendant's representation that an uncontradicted "deal" was proven is simply not supported by the record. Even Bluestein's testimony is self-contradictory. (Compare R. T. 61, 69-8, 73-4, 79, 83 with 87-8.)

It is noted that apparently the claim made by Thomas of receiving narcotics from the FBI is abandoned on appeal [App. Op. Br. 4].

CONCLUSION

Based upon the record and the authorities cited, the trial judge's findings were not only not an abuse of discretion but the only findings possible. The judgment of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America

No. 22664 ✓

IN THE
United States Court of Appeals
for the Ninth Circuit

WALTER C. GATES, doing business under the firm
name of GATES CABINETS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANT

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No. 22664

IN THE
**United States Court of Appeals
for the Ninth Circuit**

WALTER C. GATES, doing business under the firm
name of GATES CABINETS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

This action was brought in the District Court for the Central District of California by Walter C. Gates, doing business under the firm name of Gates Cabinets, (hereinafter referred to as the taxpayer), to recover from the United States the sum of \$24,073.40, with interest as allowed by law (R. 2-11) alleged to have been erroneously and illegally collected from the taxpayer as federal excise taxes. The taxes in issue were

assessed against the taxpayer allegedly pursuant to Section 4061(a) (1) of the Internal Revenue Code of 1954, and collected from him with respect to certain articles manufactured and sold by him during the period from April 1, 1960 to June 30, 1961. During the period December 7, 1961 to January 21, 1966, taxpayer paid \$25,495.06 of which \$12,000.00 was paid within two years immediately preceding the filing of a claim for refund as provided by law (R. 67), on February 17, 1966, (R. 7-10) for refund of such taxes in the amount of the alleged erroneous payment, and the present action was brought to recover the overpayments made within the time provided in Section 6532 of the 1954 Code, on November 18, 1966 (R. 2), more than six months after the claim was filed. The District Court had jurisdiction under 28 U.S.C., Sections 1340 and 1346(a) (1) and 26 U.S.C., Section 7422 of the Internal Revenue Code of 1954.

On facts agreed to by the parties and set out in the Stipulation and Order thereon (R. 34-36), plus documentary evidence introduced by stipulation of the parties, the District Court on December 29, 1967, made findings of fact and conclusions of law (R. 48-50) which were later, upon motion filed by the United States, amended (R.67-72). The District Court entered judgment for the taxpayer (R. 52) in the sum of \$5,940.27, with interest, on December 29, 1967. On February 3, 1968, the taxpayer filed Notice of Appeal (R. 65) from the Judgment entered on December 29, 1967. Jurisdiction of the appeal is vested in this Court by 28 U.S.C., Section 1291.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

The facts are not in dispute. Taxpayer was incorrectly assessed excessively for excise taxes claimed due for the years 1960 and 1961, and pursuant to such assessment paid installments as set forth in Government's Exhibit "A" during the period December 7, 1961 to January 21, 1966, paying the Government on such wrongful assessment the total sum of \$25,495.06 (R. 67). The correct excise tax liability assessment including penalty and interest, was agreed to be the sum of \$6,371.52 (R. 70). More than \$6,371.52 of the \$25,495.06 paid, had been paid as of April 23, 1963, as shown by the list of payments made in Government's Exhibit "A," and subsequent thereto, payments of \$12,000.00 were made within two years of the filing of the claim for refund (R. 34). The question presented is whether, when more money is paid than is legally owed, the United States should apply payments received first to tax, interest and penalties legally due, (here admittedly \$6,371.52) (R. 70) and that subsequent payments in excess of the tax, interest and penalty owed, such as the \$12,000.00 paid within two years of the claim for refund herein, should be deemed overpayments recoverable herein.

SPECIFICATION OF ERRORS RELIED ON

Taxpayer contends the District Court herein erred in concluding as a matter of law that the Government is not required to allocate installment payments made, first to the tax legally due, penalty, and interest

thereon, in that order, making subsequent payments refundable overpayments (R. 50), and finding instead that the Government had the right to apply the payments in any manner it saw fit (R. 71).

ARGUMENT

I

The Court should have applied the Government's own ruling applicable to partial payments of assessments by Taxpayers, as paid herein:

“Where an assessment is made for one or more years and there are not specific instructions as to the application of the partial payment tendered by the taxpayer, the amount of the payment will be applied by the District Director first to tax, penalty and interest, in that order, for the earliest year, then to tax, penalty and interest, in that order, for the next succeeding year, until the payment is absorbed. . . .”

Rev. Rul. 58-239, 1958-1 Cum. Bull. 94.

Although the foregoing Revenue Ruling deals with income taxes, the position of the Government and the Taxpayer is that the policy enunciated therein is likewise applicable to the payment of excise tax (R. 45).

Applying the above ruling, the tax owed, with penalty and interest was paid prior to April 23, 1963, and subsequent payments were overpayments.

II

The Court should have allowed Appellant Judgment for all overpayments made within two years of the date of filing Appellant's Claim for Refund.

The taxpayer is entitled to recover overpayments paid within two years immediately preceding the filing of a claim for refund.

26 U.S.C., Section 6511 (b) (2) (B) IRC 1954

The date of the overpayment is the date when total installments paid exceeds total tax liability.

Babcock & Wilcox Co. v. Pedrick, C.A.N.Y. 1954,
212 F.2d 645, 648 certiorari denied 75 S.Ct.
355, 348 U.S. 936, 99 L.Ed. 733

The overpayment is determined by comparison between amount due and amount actually paid.

Pine Hill Crystal Water Co. v. U.S. D.C. N.Y.
1954, 121 F. Supp. 480, 484

Havemeyer v. U. S., 1945, 59 F. Supp. 537, 551,
103 Ct. Cl. 564, certiorari denied 66 S.Ct.
139, 326 U.S. 759, 90 L. Ed. 456

Although no tax was owed, payment under threat of distraint resulted in "overpayment" by taxpayers and taxpayers were entitled to recover such "overpayment."

La Follette v. U.S.D.C. Cal., 1959, 176 F. Supp.
192, 195

Fischer & Porter Co. v. Porter, 1950, 72 A. 2d
98, 101, 364 Pa. 495

“In the case of a tax payable in installments, if the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 6402.”

26 U.S.C., Section 6403 IRC 1954

“In absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used. See *Rosenman v. U. S.*, 323 U.S., 658, 661, 89 L.ed. 535, 539, 65 S.Ct. 536. Hence we read the word ‘overpayment’ in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.”

Then referring to its legislative history, Sec. 281 of the 1924 Revenue Act, the Supreme Court stated additionally,

“The word was there used as a substitute for the previous reference to payments ‘in excess of that properly due,’ a phrase that is a perfect definition of an overpayment and that is not

necessarily confined to overpayments occasioned by errors made by taxpayers.”

Jones v. Liberty Glass Co., Okl. 1947, 68 S.Ct. 229, 332 U.S. 524, 92 L.Ed. 142, 148, rehearing denied 68 S.Ct. 657, 333 U.S. 850, 92 L.Ed. 1132, motion denied 68 S.Ct. 909, 334 U.S. 536, 92 L.Ed. 1157.

If we assume that the deficiency assessment and collection were without legal authority, the taxpayer's payment of that illegal assessment was an overpayment.

Kavanagh v. Noble, 68 S.Ct. 235, 237; 332 U.S. 535, 92 L.Ed. 150, 152.

CONCLUSION

For the foregoing reasons the Court should have granted Judgment for the Plaintiff for overpayments made within the two year limitation period, in the sum of \$12,000.00, plus interest thereon as allowed by law.

Respectfully submitted,

RAINBOLT & HAY

By.....

W. S. Rainbolt
Attorneys for Appellant

May, 1968

APPENDIX

APPENDIX A

TABLE OF EXHIBITS

- *Government's
Exhibit "A" Received per Stipulation.
- *Government's
Exhibit "B" Received per Stipulation.
- *Government's
Exhibit "C" Received per Stipulation.
- *Erroneously identified in the Transcript Index as Plaintiff's Exhibits.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated:day of May, 1968.

.....
W. S. RAINBOLT
Attorney for Appellant



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER C. GATES, d.b.a. GATES CABINETS,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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FILED

JUL 3 1958

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,664

WALTER C. GATES, d.b.a. GATES CABINETS,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether taxpayer, after failing to designate the manner in which he wanted his partial payments of an excise tax assessment to be allocated, may nevertheless later require the Commissioner to alter his usual method of allocation.

STATEMENT OF THE CASE

This appeal presents a question as to the correct amount of a refund of the federal manufacturer's excise taxes due taxpayer. The period involved is the five quarters ended from April 30, 1960

through June 30, 1961. Taxpayer filed a claim for refund according to law (R. 7, 67-68) which was not paid (R. 4, 13). On November 18, 1966, taxpayer filed a timely complaint for refund of excise taxes erroneously assessed and paid. (R. 1, 2-5.) On December 29, 1967, the District Court found that taxpayer was entitled to a refund of \$5,940.27 and accordingly entered judgment. (R. 1, 52.) The amended findings of fact and conclusions of law were entered February 7, 1968 (R. 1, 67-72) and are not officially reported. Within 60 days after entry of judgment, taxpayer filed a notice of appeal. (R. 65.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

Taxpayer is an individual residing in Los Angeles County, California, doing business under the name of Gates Cabinets. Between April, 1960 and June, 1961, taxpayer manufactured units known as "pickup coaches" and "truck accessories."^{1/} In this connection, the Commissioner issued four excise tax assessments against taxpayer as follows (R. 69):

<u>Assessment No.</u>	<u>Date of Assessment</u>	<u>Tax</u>	<u>Additions to Tax</u>	<u>Total</u>
11-352033-61L	11-9-61	\$22,147.82	\$5,609.81	\$27,757.63
J-11-460-61L	11-17-61	5,090.19	429.30	5,519.49
2-34110-62L	3-9-62	2,941.34	- 0 -	2,941.34
5-341280-62L	6-8-62	1,916.29	- 0 -	1,916.29
				<u>\$38,134.75</u>

The latter three assessments were fully satisfied. The correctness of the Commissioner's determination with respect to them is not at

^{1/} Two of taxpayer's products are involved in this appeal. The greater portion of the sales during the relevant period were of "camper bodies," a body which resembles a house trailer but which is designed to be mounted in the bed of pickup trucks. The other product was a "camper top", a one-piece top used to cover the camper bodies or to enclose the bed of a pickup truck. (Report of Revenue Agent, Deft's Ex. B., p. 3.)

issue in view of the taxpayer's failure to file timely claims for refund. (R. 27, 70.)^{2/}

This appeal involves only the assessment of November 9, 1961, on which taxpayer paid, by installments, \$15,117.94. Of this amount, \$3,117.94 was paid before February 16, 1964 (two years prior to the filing of the claim for refund), and is therefore not within the statutory period for tax refunds. (R. 71.)^{3/} Taxpayer did not accompany his payments on the assessment in issue with any instructions as to their allocation. Nor did he at any time, prior to the institution of this action in the District Court, communicate his desires to the Internal Revenue Service as to how such payments were to be applied. (R. 68.)

The Commissioner subsequently determined that the correct tax liability pursuant to Section 4061(b) of the 1954 Code for the period covering the assessment at issue was in the amount of \$6,371.52. This figure represents the sum of \$4,043.52 for Section 4061(b) tax liability, \$773.27 for delinquency penalty, \$33.54 for

^{2/} Taxpayer filed a second cause of action based upon these assessments (R. 4-5) but in view of his failure to file claims for refund, the District Court was without jurisdiction and thereby dismissed this claim (R. 27-28). Taxpayer does not challenge the correctness of the District Court's dismissal of his second cause of action in his brief before this Court and we consider the issue abandoned.

^{3/} See Section 6511(b)(2)(B), Internal Revenue Code of 1954. The maximum claim possibly allowable is the difference between \$15,117.94 and \$3,117.94, or \$12,000.

depository receipt penalty and \$1,521.19 for interest. (R. 70.)^{4/}

The Commissioner then determined, after making an adjustment increasing the refund by that portion of the barred payments which were allocated to the tax actually payable, that taxpayer was entitled to a refund of \$5,940.27. This amount was computed as follows (R. 71):

Total payments on Account No.	
11-352033-61L	\$ 15,117.94
Less: Payments made prior to	
February 16, 1964 and not within	
the statutory period	3,117.94
Tax paid and considered as claimed	\$ 12,000.00
Less: Correct tax liability	6,371.52
Refund before adjustment	\$ 5,628.48
Plus: Portion of the barred payments	
allocated to correct tax liability	311.79
Total amount refundable	\$ 5,940.27

This refund was calculated by the Commissioner in conformity with his stated position in Rev. Rul. 58-239, 1958-1 Cum. Bull. 94, Appendix, infra. (R. 71.)

The District Court held that taxpayer was entitled to a refund of \$5,940.27, as determined by the Commissioner. (R. 72.) Taxpayer thereafter prosecuted the instant appeal. (R. 65.)

^{4/} This redetermination of the correct tax liability was prompted by a change in position by the Commissioner with respect to the taxation of the camper bodies. At the time that the assessment at issue was made, the Commissioner's position was that the camper bodies were truck accessories taxable under Section 4061(a). See Rev. Rul. 60-39, 1960-1 Cum. Bull. 406. However, after unsuccessful litigation, the Commissioner subsequently decided that these camper bodies were not truck accessories. King Trailer Co. v. United States, 350 F. 2d 947 (C.A. 9th); Rev. Rul. 66-163, 1966-1 Cum. Bull. 252. Accordingly, the correct tax liability figure arises solely from the imposition of the eight percent tax upon taxpayer's manufacture of the camper tops. (Deft's Ex. B, pp. 6-7.)

ARGUMENT

TAXPAYER CANNOT LATER REQUIRE THE COMMISSIONER TO ALTER HIS USUAL METHOD OF ALLOCATION BECAUSE HE FAILED TO DESIGNATE THE MANNER IN WHICH HE WANTED HIS PARTIAL PAYMENTS OF AN EXCISE ASSESSMENT TO BE ALLOCATED

A. Introduction

The sole issue presented on this appeal is the correct amount of the excise tax refund due taxpayer for the period at issue covering the five quarters ended April 30, 1960 to June 30, 1961. The Commissioner's original assessment covering this period was in the amount of \$27,757.63 and taxpayer made partial payments thereon totaling \$15,117.94. (R. 70.) In view of the fact that only \$12,000 of these payments were made within two years of February 17, 1966, the date upon which taxpayer filed his claim for refund (R. 67-68), that is the maximum amount placed at issue in this case. See Section 6511(b)(2)(B), Internal Revenue Code of 1954, Appendix, infra.

Pursuant to the policy promulgated in Rev. Rul. 66-163, supra, wherein the Commissioner decided not to impose Section 4061(a) tax upon the sale of camper bodies, taxpayer's liability for the period at issue was redetermined to be \$6,371.52. (R. 70.)^{5/} In order to arrive at the correct amount of the refund due taxpayer, the Commissioner subtracted this amount of the correct tax liability (\$6,371.52) from the maximum amount possibly refundable (\$12,000)

^{5/} Taxpayer acknowledges (Br. 3) that this figure represents the correct amount of the excise tax liability for the period at issue.

and added an allocable portion of the payments barred by the statute of limitations to the correct tax liability (\$311.79). As computed by the Commissioner, the correct amount of the refund to which taxpayer was entitled was therefore \$5,940.27. (R. 71.)

The District Court approved this method of computation and entered judgment for taxpayer in the above amount.^{6/} It found that taxpayer failed to designate the manner in which he wanted his partial payments allocated (R. 68) and that the Government, in computing the amount refundable, applied the partial payments made by taxpayer in a manner consistent with Internal Revenue Service policy, as contained in Rev. Rul. 58-239, 1958-1 Cum. Bull. 94, Appendix, infra (R. 71). It is the Government's contention that the District Court was correct and should be affirmed.

B. The District Court correctly found that the amount refundable to taxpayer was computed in a manner consistent with Rev. Rul. 58-239

The rule has long been settled that a debtor who makes a payment on a debt has a right, if he so chooses, to direct its appropriation and, if he fails to do so, the right devolves upon the creditor. Nat. Bank, etc. v. Mechanics' Nat. Bank, 94 U.S. 437; United States v. January, 7 Cranch 572; United States v. Kirkpatrick, 9 Wheat. 720; Field v. Holland, 6 Cranch 8. Similarly, this general principle has been held to apply to debts owing for federal taxes. Hewitt v. United States, 377 F. 2d 921, 925 (C.A. 5th); Datlof v.

^{6/} Since the amount of the District Court's judgment reflects the tax due as \$6,371.52, the amount conceded by the Commissioner, the Government did not institute an appeal.

United States, 370 F. 2d 655, 658-659 (C.A. 3d), certiorari denied, 387 U.S. 906.

Pursuant to this general power in the Commissioner to allocate partial payments in the absence of directions from the taxpayer, Rev. Rul. 58-239, supra, was promulgated. It provides for a specific method of allocation to be used by the Commissioner when the taxpayer fails to instruct any allocation. The relevant portion of this ruling states as follows (1958-1 Cum. Bull. 94, 95):

Where an assessment is made for one or more years and there are no specific instructions as to the application of the partial payment tendered by the taxpayer, the amount of the payment will be applied by the District Director first to tax, penalty and interest, in that order, for the earliest year, then to tax, penalty and interest, in that order, for the next succeeding year, until the payment is absorbed.

Since taxpayer satisfied the three other assessments in full, the only assessment at issue is Account No. 11-352033-61L for \$27,757.63, upon which he paid \$15,117.94. With respect to this latter amount, it is clear that taxpayer failed to communicate any instructions to the Internal Revenue Service as to how he wanted these payments allocated. Accordingly, the procedure as set forth above was followed and the payments were allocated first to tax, penalty and interest, in that order, for the earliest tax period within the assessment (the quarter ended April 30, 1960), and then to each succeeding quarter. Absent any allocation requested by taxpayer, the \$3,117.94 paid prior to February 16, 1964, must be regarded as satisfying pro rata both the Section 4061(a) and 4061(b) taxes. As a result, the only effect which the \$3,117.94 amount paid

outside the statute of limitations can have upon taxpayer's refund is the part of this sum attributable to Section 4061(b) taxes, namely, \$311.79. The remainder of this sum was properly allocable to the Section 4061(a) taxes and cannot be recovered because of the bar of the statute of limitations.

In approving this mode of allocation, the Tax Court observed in Keith v. Commissioner, 35 T.C. 1130, 1139, that in the absence of any instructions from taxpayer, "an established procedure should be followed" and that this allocation procedure was promulgated "in the interest of an orderly and equitable procedure for the application of such payments." See also Marcus v. Commissioner, decided August 4, 1964 (P-H Memo T.C., par. 64,206). While taxpayer could have possibly secured a larger refund by specifically instructing the Internal Revenue Service to allocate his payments to the Section 4061(b) taxes, he did not do so. Consequently, the rule of Rev. Rul. 58-239, supra, requires the simple chronological allocation made by the Commissioner.

Taxpayer does not dispute the validity or applicability of the principle of Rev. Rul. 58-239, supra. Rather, he appears to contend (Br. 4-6) that the Commissioner's policy of allocation as enunciated in that ruling requires a refund of \$12,000, the maximum amount available under the statute of limitations. Taxpayer's reasoning is as follows: of the total amount paid to the Government on all four assessments (\$25,495.06), an amount equal to the correct tax liability (\$6,371.52) was paid within two years of the filing of the claim for

refund. From this fact, taxpayer concludes that the entire \$12,000 represents an excessive payment by him and should be refunded.

The fallacy of this argument is that it rests upon two false assumptions, namely, (1) that the payments made on the three other assessments not involved herein should be considered as having been made on the assessment at issue; and (2) that the payments made on the assessment at issue should have been allocated first to the Section 4061(b) tax, the statutory provision upon which the correct tax liability is based. We submit that neither of these assumptions can be sustained.

C. Taxpayer cannot now reallocate the payments made on the three assessments not at issue to the single assessment at issue because such an allocation would circumvent the statute of limitations

Taxpayer's argument for the maximum refund of \$12,000 involves a reallocation of payments he initially made to satisfy fully the three smaller assessments which are not at issue. In so contending, he completely ignores the fact that the payments made on those other assessments are barred by the statute of limitations because of his failure to file timely claims for refund.^{7/} Indeed, the cause of action relating to these assessments was dismissed by the District Court for that very reason. (R. 27-28.) Consequently, the amounts paid on the three other assessments are not at issue and cannot be considered on appeal. Since taxpayer cannot directly recover the

^{7/} Had taxpayer fully paid and filed a timely claim for refund on any of the transactions taxed in one of the assessments, he could have tested the validity of all of the Commissioner's assessments. See Flora v. United States, 362 U.S. 145, 171 n. 37, 175 n. 38; Compton v. United States, 334 F. 2d 212, 215 n. 6 (C.A. 4th).

sums paid on the three other assessments, it would be plainly contrary to the intendment of the statute of limitations for him to be able to shift the payments made on these closed assessments to the single open assessment at issue so as to derive benefit from time-barred payments. Taxpayer should not be able to accomplish indirectly what he could not do directly because of the statute of limitations and the correlative jurisdictional requirement of a timely claim for refund. See Section 7422(a) of the 1954 Code. His failure to preserve his rights as to the three later assessments is completely dispositive of his contention. In this connection, it should be noted that the Commissioner has squarely ruled to this effect. Rev. Rul. 57-73, 1957-1 Cum. Bull. 612.

In any event, there is no basis in this record for any argument that Rev. Rul. 58-239, supra, required an allocation by the Commissioner of any of the payments made on the three assessments not at issue to the single assessment which is at issue. Although the three other assessments covered periods subsequent to the period covered in the single assessment, taxpayer paid in full two of the three other assessments (in the amounts of \$2,941.34 and \$1,916.29) together with his submission of the returns. (Compl. Ex. F, R. 11; Deft's Ex. A.) By submitting full payment with the returns relevant to these two assessments, it is clear that taxpayer wanted the Internal Revenue Service to allocate these accompanying payments to these assessments. Surely this act of full payment was an explicit instruction to the Commissioner to satisfy the particular liabilities represented on the submitted returns. Upon receipt of such an instruction, the Commissioner correctly satisfied these assessments.

With respect to the remaining assessment in the amount of \$5,519.49, taxpayer paid this sum in installments. (Deft's Ex. A.) Although the record does not disclose any specific directions communicated by taxpayer as to the allocation of these payments, such an allocation would not have been made to an assessment covering a later period, absent a request by taxpayer. While the record is silent on this point, it should be noted that it is the prescribed practice of the Internal Revenue Service to transmit a statement on a standard form (TY 54) to a taxpayer who submits a part payment. This form acknowledges receipt of the payment and indicates the account to which it has been credited. It is therefore clear that taxpayer, who undoubtedly received this form, was aware that some of his payments were being credited to the account bearing the total liability of \$5,519.49. Receipt by taxpayer of such forms, coupled with his failure to request an alternative allocation, clearly constitutes an acquiescence to the Commissioner's allocation. This is essentially equivalent to an agreement or a specific instruction to that effect.

Moreover, taxpayer has not shown anything which would indicate that he ever objected to the Commissioner's allocation or that he requested a contrary allocation on this assessment. Taxpayer cannot now, with the benefit of hindsight, reallocate these payments to achieve a larger refund on the assessment at issue. Accordingly, there is no merit to the contention that the principle of Rev. Rul. 58-239, supra, requires a reallocation of taxpayer's payments on the three smaller assessments not at issue to the single assessment which is at issue. Rather, the record strongly demonstrates the correctness of the District Court's finding (R. 71) that taxpayer's refund was computed in a manner consistent with this ruling.

D. Taxpayer cannot now reallocate the payments made on the single assessment in issue so as first to satisfy the Section 4061(b) liability

Taxpayer's second assumption upon which his argument rests is that the Commissioner should have allocated the payments made on the assessment at issue first to Section 4061(b) tax and then to the Section 4061(a) tax. Focusing only on the single assessment at issue, the effect of taxpayer's reallocation would be to regard the entire \$15,117.94 paid as first satisfying the Section 4061(b) liability, which is in the amount of \$6,371.52. The end result of this argument appears to urge a refund of \$8,746.42, the difference between the above two figures.

As we have pointed out supra, taxpayer did not request the Internal Revenue Service to make such an allocation within the assessment at issue. Consequently, the procedure of Rev. Rul. 58-239, supra, calling for chronological allocation of the payments was properly employed. The effect of such an allocation was that the payments were apportioned between the taxes imposed by both subsections (a) and (b) of Section 4061 for each particular period in chronological order. To the extent that part of these payments made more than two years prior to the filing of a claim was correctly allocated to Section 4061(a) taxes, the statute of limitations bars their recovery. Rev. Rul. 57-73, supra.

In arguing for an allocation of the payments first to the Section 4061(b) tax, taxpayer emphasizes (Br. 3) that this imposition was the only tax which was "legally due." Again, however, such a contention is grounded upon the benefit of hindsight. It

must be emphasized that at the time that the Commissioner was satisfying this assessment with taxpayer's part payments, he had not yet changed his position on the applicability of Section 4061(a) to taxpayer's camper bodies. Since these taxes were at that time fully applicable, the Commissioner was therefore under no obligation (absent instructions from taxpayer) to satisfy the Section 4061(b) taxes first. Hence, the contention that no amount of the payments on the assessment in issue could be allocated to the Section 4061(a) liability because those taxes were not "legally due" is entirely without merit. On the contrary, at the time of payment the Section 4061(a) excises were clearly due--and without any specific instruction to the contrary, proportionate parts of taxpayer's payments properly went to satisfy the liabilities imposed by both subsections (a) and (b) of Section 4061. To the extent he did not preserve his rights to the Section 4061(a) payments either by filing timely claims for refund^{8/} or by allocating his part payments first to the Section 4061(b) liability, taxpayer cannot recover the amount of the Section 4061(a) taxes paid outside the two-year statute of limitations.^{9/}

^{8/} See footnote 7, supra.

^{9/} None of the authorities cited by taxpayer lend any support for the allocation which he urges. To the extent that Pine Hill Crystal Spring Water Co. v. United States, 121 F. Supp. 480 (S.D. N.Y.) suggests that the tax paid within the limitations period represents a maximum amount recoverable rather than the maximum sum placed at issue, from which the tax due must be subtracted, the decision turned on the reciprocal relationship between the excess profits and income taxes and is therefore distinguishable.

In sum, taxpayer's arguments for reallocation of his partial payments are directly contrary to both the bar of the statute of limitations^{10/} and the principle of Rev. Rul. 58-239, supra, that in the absence of any instruction the Commissioner will allocate a part payment on an assessment to the earliest tax due. The principle of this ruling represents a reasonable administrative solution by the Commissioner to a problem which plainly requires an established procedure. Generally, allocation of part payments first to the earliest period will provide for the maximum extension of the statute of limitations. That such allocation reduced taxpayer's refund in this instance is merely indicative of the fact that an automatic rule cannot, by its very nature, be responsive to all cases. It does not, we submit, diminish the utility of the rule itself. Finally, it is clear that taxpayer had it within his power to suspend the operation of the Commissioner's allocation rule by designating an alternative allocation. His original failure to do so cannot be remedied at this stage of the proceeding. The District Court therefore correctly rejected taxpayer's attempts to reallocate his partial payments after the fact. Accordingly, the amount of his refund for the single assessment at issue cannot exceed the sum determined by the Commissioner and approved by the District Court as having been computed in a manner consistent with Rev. Rul. 58-238, supra, namely, \$5,940.27.

^{10/} It is beyond question that the bar of the statute of limitations is essential to an orderly administration of the taxing statutes. As the Supreme Court noted in Rothensies v. Electric Battery Co., 329 U.S. 296, 301: " *** a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy."

CONCLUSION

For the foregoing reasons, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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JULY, 1968.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 2nd day of July, 1968, in an envelope, with postage prepaid, properly addressed to him as follows:

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Special Asst *1st Legal E. Kerr*
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APPENDIX

Internal Revenue Code of 1954:

SEC. 6511. LIMITATIONS ON CREDIT OR REFUND.

(a) Period of Limitation on Filing Claim.--Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on Allowance of Credits and Refunds.--

(1) Filing of Claim Within Prescribed Period.--No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on Amount of Credit or Refund.--

(A) Limit where claim filed within 3-year period.--If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-year period.--If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) Limit of no claim filed.--If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * *

(26 U.S.C. 1964 ed., Sec. 6511.)

Rev. Rul. 58-239, 1958-1 Cum. Bull. 94:

To the extent that additional taxes, penalty and interest have been assessed for one or more years against a taxpayer whose income is reported on the cash method of accounting, a partial payment thereon tendered to the District Director of Internal Revenue and accepted by him with specific directions by the taxpayer as to its application will be applied, as a general rule, in accordance with such directions. Amounts tendered in partial payments of assessed deficiencies or deficiencies mutually agreed to as to amount of liability but unassessed at the time of tender, for one or more years, without instructions from the taxpayer, will be applied by the District Director first to tax, penalty and interest in that order, due for the earliest year, then to tax, penalty and interest for the next succeeding year until the payment is absorbed. Interest satisfied by such partial payments will be deductible for Federal income tax purposes for the year in which it is paid.

Advice has been requested relative to the application, by a District Director of Internal Revenue, of a partial payment of tax, penalty and interest, assessed for one or more years, made by a taxpayer regularly employing the cash receipts and disbursements method of accounting, and whether the interest, if any, satisfied by such partial payment is deductible for Federal income tax purposes in the year in which it is paid.

Where additional taxes, penalty and interest are assessed for one or more years against a taxpayer whose income is reported on the cash method of accounting, a partial payment thereon tendered to and accepted by the District Director of Internal Revenue with specific directions by the taxpayer as to its application, will be applied, as a general rule, in accordance with such directions. The amount of interest satisfied by such a partial payment will be deductible in computing taxable income for the year in which the payment is made.

Where an assessment is made for one or more years and there are no specific instructions as to the application of the partial payment tendered by the taxpayer, the amount of the payment will be applied by the District Director first to tax, penalty and interest, in that order, for the earliest year, then to tax, penalty and interest, in that order, for the next succeeding year, until the payment is absorbed. The portion of the payment applied to interest for any year will be deductible in computing taxable income for the year in which the partial payment is made.

Amounts tendered, in partial payment of deficiencies mutually agreed to as to the amount of liability but unassessed at the time of the tender, for one or more years, without instructions from the taxpayer, as to the application of the payment, will be applied by the District Director first to tax, penalty and interest, in that order, due for the earliest year, the interest to be computed under the applicable provisions of law, then to tax, penalty and interest, in that order, for the next succeeding year until the payment is absorbed. The deficiencies and interest will be immediately assessed and notice and demand issued for any unpaid tax and interest due for any year. The portion of the payment applied to interest for any year will be deductible in computing taxable income for the year in which the partial payment is made. However, where a lump sum is accepted in compromise of tax, penalty and interest, which sum is less than the principal amount of the tax and penalty claimed by the Government, no part of the amount of such compromise is deductible as interest.

No. 22664

JUL 15 1968

IN THE

**United States Court of Appeals
for the Ninth Circuit**

WALTER C. GATES, doing business under the firm
name of GATES CABINETS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.**

APPELLANT'S REPLY BRIEF

FILED

JUL 15 1968

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LONG BEACH REPORTER

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APPELLANT'S REPLY BRIEF

I

Appellee's Brief Incorrectly States the Issue.

Taxpayer has not requested the Commissioner to alter a "usual method," but instead, taxpayer has raised the issue as to whether the Commissioner should be required to follow his own Ruling and the common law.

II

Appellee has Wrongfully Concluded Appellant's Claim is for Refund From a Particular Account Set Up by Appellee.

This is not correct. Appellant's claim for refund is for all overpayments of Excise Taxes wrongfully assessed and collected for the period 4-1-60 through 9-30-61 (R. 7-10). There is no dispute that of the \$25,495.06 (R. 70) paid, only \$6,371.52 (R. 70) was legally owed, making the overpayment of the wrongful assessment and collection by the Government herein \$19,123.54. This sum would all be recoverable by appellant except for the Statute of Limitations which the District Court held limited Appellant's recovery of such wrongful assessment and collection to payments made within two years of the date of the filing of claim for refund. There is no dispute that payments totaling \$12,000.00 were made during such two-year period immediately preceding the date of the filing of the claim for refund (R. 70).

The taxpayer is entitled to recover for the amount paid which is in excess of the amount of tax legally due,

Crocker v. Malley, Mass., 39 S.Ct. 270, 249 U.S. 223, 63 L. Ed. 573, 2 A.L.R. 1601

Mennen Co. v. Kelly, C.C.A.N.J., 137 F.2d 866

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White Motor Co. v. U.S., Ct.Cl., 3 F. Supp. 635, certiorari denied *U.S. v. White Motor Co.*, 54 S.Ct. 91, 290 U.S. 672, 78 L. Ed. 580

regardless of whether such overpayment is by the collector's erroneous application of a credit.

U.S. v. Piedmont Mfg. Co., C.C.A.S.C., 89 F.2d 296

C. I. R. v. McDonald, C.A.La., 320 F.2d 109

III

Appellee has Illogically Argued That it is "Usual" for the Commissioner to Wait Until the Statute of Limitations Period is Determined by Taxpayers Filing of a Claim for Refund, and Then Deduct the Full Amount of Tax Legally Due From the Payments Made During a Recoverable Time Period (Br. 5 and 6).

No law is cited to support this argument. Such an argument is contrary to *Rev. Rul. 58-239, 158-1 Cum. Bull. 94* providing that payments made (without reference to statutes of limitations) should be applied first to taxes due, then to penalty and interest due, in that order. Appellee appears to argue that the "usual" method of the Commissioner is to apply payments to taxes not due, if recovery of such illegally assessed taxes is barred by a statute of limitation.

To apply Appellee's cited *Rev. Rul. 58-239, 158-1 Cum. Bull. 94* logically, is also to follow the Common law as to debtor's payments of funds without designation for application, i.e., the funds must be applied to debts actually owed, and subsequent payments in excess of amounts actually owed are overpayments recoverable unless barred by a statute of limitations. This has always been not only logical, but the law upon which Appellee's Ruling is obviously founded.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court erred in not providing that the Commissioner should have applied payments made by Appellant first to taxes legally owed, penalty and interest due, and that subsequent overpayments of \$12,000.00 made within two years prior to filing his claim for refund were recoverable.

Respectfully submitted,

RAINBOLT & HAY

By.....

W. S. Rainbolt

Attorneys for Appellant

July, 1968

No. 22667

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLE MADSEN,

JUL 3 1968

Appellant,

vs.

A. J. BUMB, as receiver and trustee, etc., etc.,

Appellee.

APPELLEE'S BRIEF.

FILED

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No. 22667

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLE MADSEN,

Appellant,

vs.

A. J. BUMB, as receiver and trustee, etc., etc.,

Appellee.

APPELLEE'S BRIEF.

I.

NATURE OF CASE.

This is an appeal by defendant below, Cole Madsen, from a Default Judgment entered by Irving Hill, United States District Judge, for the Central District of California on December 4, 1967, and the Order for Default Judgment also entered on December 4, 1967 [See Notice of Appeal R-411].

II.

STATEMENT OF FACTS.

While appellee has no real quarrel with appellant's statement of facts, as such, it is felt that it should be expanded to refer to the counter affidavits filed by appellee before the District Judge on the motion to set aside the default. These are the affidavits of A. J. Bumb [R-140], David A. Maddux [R-137], John J. Wilson [R-131], as well as the affidavit of Wilbur G.

Dettmar, which was not designated by appellant as part of the record herein but which is referred to by the District Judge on pages 7 and 11 of the transcript of the proceedings had before him on April 24, 1967.

The Court's attention is also called to the Affidavit of Cole Madsen which, in the main, is not relevant to the issue presented on the within appeal and the same goes on for many pages making various charges against the trustee's administration and the trustee's counsel [R-87-91].

Page 10 of appellant's said affidavit [R-92] states:

“Mr. Bumb, as trustee, has brought an order to show cause set for March 29, 1967, at 2:00 P.M. in Referee Moriarty's court for the purpose of determining the ownership of stock of Chase Capital Corporation. This is another waste of corporate assets—”.

Appellee admits that said proceeding has been brought and an Order was made after very extensive hearings in connection therewith on February 21, 1968, which completely determines the stock status. The same is currently on review before U. S. District Judge William P. Gray, which review has been filed by Cole Madsen disputing the findings with respect to the capital stock. We will not comment further thereon inasmuch as this particular issue, which in effect is the same determination made in the instant case insofar as the First Cause of Action is concerned, may well be before this Honorable Court on a separate appeal in the future.

It is also felt that the Court's attention should be called to the affidavit of Vaughn R. Antablin [R-80] which indicates he obtained an extension of time to an-

swer on behalf of appellant. Appellee feels that there is great significance in the fact that the written stipulation for continuance which was *prepared by Antablin* only recites a continuance to Antablin and does not mention Madsen.

In the following argument, appellee will answer, point by point, the arguments raised by appellant in his brief on pages 5 and 6 under the heading "Specification of Errors Relied On".

III.

SUMMARY OF ARGUMENT.

- (A) THE ORDER OF THE DISTRICT COURT DENYING APPELLANT'S MOTION TO SET ASIDE THE DEFAULT CANNOT BE REVERSED UNLESS APPELLANT CAN SHOW THAT THE DISTRICT COURT ABUSED ITS DISCRETION.
- (B) APPELLANT'S POINT THAT HIS COUNSEL WAS MENTALLY ILL HAS NO BASIS IN FACT AND IS BEING RAISED FOR THE FIRST TIME ON APPEAL.
- (C) APPELLANT'S "CONSTITUTIONAL RIGHTS" HAVE NOT BEEN VIOLATED.
- (D) PLAINTIFF'S COMPLAINT DOES STATE A CAUSE OF ACTION AS FOUND BY THE DISTRICT COURT AND ON APPEAL FROM DEFAULT JUDGMENT, AVERMENTS OF THE COMPLAINT MUST BE ACCEPTED AS TRUE AND TRIAL COURT NEED NOT HEAR ANY FORMAL EVIDENCE ON DAMAGES.

(E) THE JUDGMENT DID NOT GO BEYOND THE COMPLAINT.

(F) THE COMPLAINT DOES, ON ITS FACE, SHOW DAMAGE CAUSED BY APPELLANT.

IV.

ARGUMENT.

Introduction.

Appellee, in presenting his argument herein, will attempt to answer, point by point, and in chronological order, the specifications of alleged errors set forth by appellant in his brief on pages 5 and 6.

Appellant's argument set forth on pages 8 through 15 of his brief attempts to cover the said specifications of alleged errors and after a careful reading of said argument one is able to segregate appellant's argument (at least to some extent) into the categories which he breaks down into some seven specifications of alleged errors.

However, appellee is unable to understand what appellant is attempting to accomplish by the comments made by him in his brief on page 13, line 24 through page 14, line 5. There is some reference to the alleged "mental illness" of Mr. Antablin and possibly appellant is attempting to cover his Specification of Error II. Appellant makes reference to an alleged "deal" which, it is submitted, has no bearing on this appeal as the same is not only not in the record on appeal but not in any other record save perhaps Mr. Madsen's imagination which, apparently, knows no bounds.

It is submitted that in this appeal we must be careful to distinguish between a "default" and a "default judg-

ment”. Some of the cases as well as appellant tend to discuss these terms as one while in reality they are two different creatures of law.

The default is entered by the clerk for failure of a party to plead or defend under Rule 55(a) of the Federal Rules of Civil Procedure which provides :

“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.”

Default Judgment is covered by Rule 55(b) of the Federal Rules of Civil Procedure and may be entered by the Clerk in certain cases or by the Judge in others. Said Rule provides as follows :

“(1) *By the Clerk.* When the plaintiff’s claim against a defendant is for a sum certain or for a sum which can be computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

“(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing

by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.”

In the instant case, appellant's default was entered by the Clerk on August 4, 1965 [R-37]. Appellant's Motion to Set Aside the default was denied by the District Court on May 5, 1967 [R-276]. Default Judgment was entered against appellant by the District Court on December 4, 1967 [R-407]. From the default judgment appellant has filed his Notice of Appeal [R-411].

In the discussion below appellee will attempt to discuss these two terms separately as it is felt the principles of law governing an appeal from each have different guidelines which are followed by the appellate courts.

It is further submitted by appellee that the entire discussion of this appeal hereinbelow should also be considered in light of the “clearly erroneous” rule of Rule 52(a) of the Federal Rules of Civil Procedure for it is felt that said principle lends even more weight to all of appellee's arguments.

(A) The Order of the District Court Denying Appellant's Motion to Set Aside the Default Cannot Be Reversed Unless Appellant Can Show That the District Court Abused Its Discretion.

Appellant contends that this Honorable Court should reverse the District Court's Order refusing to set aside the default (Specification of Error I).

In his brief appellant discusses the provisions of Rule 60(b) of the Federal Rules of Civil Procedure.

However, Rule 60(b) has no application to a motion to set aside a default. Said rule, by its terms, deals with relief from "a final judgment, order, or proceeding—" and an Order denying a motion to vacate a default is not a final order as determined by this Honorable Court on October 10, 1967, in the appeal of *Madsen et al. v. A. J. Bumb etc., No. 22146*.

Although appellant's brief is not clear on this point, we assume he is now appealing from the Order of May 5, 1967, on the principle that interlocutory orders, from which no direct appeal will lie merge into the final judgment (the default judgment of December 4, 1967) and are open to review on appeal from the final judgment. *Atchison, T. & S.F. Ry. Co. v. Jackson* (10th Cir. 1956), 235 F. 2d 390. Under this principle, then, this Court can review the Order of May 5, 1967, although this appeal was taken from the judgment entered on December 4, 1967.

As stated above, Rule 60(b) does not apply to the setting aside of defaults. The setting aside of defaults is governed by Rule 55(c) of the Federal Rules of Civil Procedure, which provides, in part:

"For good cause shown the court may set aside an entry of default. . . ."

Whether the entry of default should be set aside, however, is a matter addressed to the discretion of the District Court. *Kulakowich v. A/S Borgestad*, (D.C. Pa. 1964) 36 F.R.D. 185; *Trueblood v. Grayson Shops of Tennessee Inc.*, (D.C. Va. 1963) 32 F.R.D. 190; *Duling v. Markum*, (7th Cir. 1956) 231 F. 2d 833; and his actions are not lightly to be disturbed by an appellate court. *Hiern v. St. Paul Mercury Indem. Co.*, (5th Cir. 1959) 262 F. 2d 526.

It is submitted that appellant has failed to show that the District Court abused its discretion in refusing to set aside the default and therefore this Honorable Court must affirm that Order.

The District Court, in denying appellant's motion to set aside the default, indicated it was aware of the general rule that relief from default should not be unreasonably denied [R-276, lines 28-32] and went on to find that appellant did not show "good cause" for relief under Rule 55(c) in that (1) *he failed to show excusable neglect*, and (2) *he failed to show that he has a meritorious defense to the action*.

The District Court, in connection with said motion, disbelieved the testimony and version of facts offered by appellant and Mr. Antablin and believed the testimony and version of facts offered by appellee's counsel.

In short, the District Court's findings, as aforesaid, are not "clearly erroneous" and were amply supported by the evidence and no showing can be made that the District Court abused its discretion in connection therewith under the principles laid down in such cases as *Ferraro v. Arthur M. Rosenberg Co.*, (2nd Cir. 1946) 156 F. 2d 212 and *Bowles v. Branick*, (D.C. Mo. 1946) 66 F. Supp 557.

(B) Appellant's Point That His Counsel Was Mentally Ill Has No Basis in Fact and Is Being Raised for the First Time on Appeal.

Appellant now urges this Court as grounds for reversing the Order of the District Court refusing to set aside appellant's default that "Appellant was deprived of proper or any legal representation at the hearing—in that his counsel—was incapable at the time."

It will be noted from the record that this point was never urged before the District Court and there is no evidence on it.

Appellant now proposes to make his argument to this Honorable Court on the basis of three psychiatrist's reports which appellant has attached to his brief. These reports were not part of the record on appeal (as they would clearly be inadmissible as hearsay) and they cannot be considered by this Honorable Court on appeal of this case.

If this Court does determine that it wishes to consider said reports, we feel it would be important for the Court to know that on the basis of said reports the Superior Court, by virtue of an Order entered on May 20, 1968, determined that Vaughn R. Antablin was sane and was capable of standing trial. Attached hereto, marked "Exhibit A" and by reference made a part hereof, is a copy of said Order.

Even if these reports were a part of the record, we are not so sure they say what appellant contends they do and furthermore appellee is not aware of any law that states that a person is entitled to be represented by an attorney, as a matter of right, in a *civil* action.

Appellant cites three cases in his brief for the proposition that a party is entitled to be represented by an attorney as a matter of right.

The first case cited by appellant is the case of *In re Evenod Perfumer Inc.*, (2nd Cir. 1933) 67 F. 2d 878, which held that an attorney for a bankrupt is not entitled to compensation from the estate for unsuccessfully contesting an involuntary petition. The Court did mention, as dictum, that a debtor was entitled to counsel in a bankruptcy proceeding.

The second case cited by appellant is *Mintz v. Irving Trust Co.*, 54 S. Ct. 455, which is a *per curiam* decision denying certiorari from the *Evenod* case.

The third case is *In re Huntington & Broad Top Mountain R. R. Coal Co.*, 213 F. 2d 411, which involved questions of standing to appeal in a railroad reorganization case under the bankruptcy act.

In short, the cases cited by appellant don't have the slightest application to the case at bar and the "argument" raised by appellant on this point is spurious at best.

The closest authorities in point which appellee was able to find are the annotations contained in 24 A.L.R. 1025, 64 A.L.R. 436 and 74 A.L.R. 2d 1420, which deal with insanity of counsel in *criminal* matters. However, even if we apply the cases dealing with criminal matters, it is stated in 64 A.L.R. 436 on pages 439 and 440:

"In *Hagan v. United States*, (1925; C.C.A. 8th) 9 F.2d 562, the defendant sought to show by affidavit that after the termination of the trial in the lower court he learned that his attorney, 'at the

trial, was suffering from grave mental and physical disorders, and was therefore unable to properly defend him.' Defendant also submitted an affidavit from a physician claiming to be in charge of a sanitarium in which attorney for the defendant was confined, to the effect that the attorney was suffering from 'manic depressive insanity of the manical type.' The affidavit stated further that the physician 'understood' that counsel's trouble dated back a number of years, and that he was unable completely to perform any intelligent labor in connection with his law practice for at least a year or more prior to coming to his sanitarium. This state of facts was urged as ground for a new trial, after conviction. . . . In refusing a new trial, the court said: 'A careful examination of this entire record evinces no lack of ability or alertness on the part of counsel for Hagan, either during or after the trial. . . . Also, this case was tried before an able judge of long experience, and it seems incredible that this counsel could have been mentally incompetent at the time of and in connection with this trial and no suspicion have occurred either to the judge, or to Hagan himself. The record shows a careful trial and a spirited defense in the face of overwhelming proof of guilt.' "

(C) Appellant's "Constitutional Rights" Have Not Been Violated.

Appellant, in his brief, makes the flat statement that his "rights have been violated under the 1st, 4th, 5th, 7th and 14th Amendments to the Constitution of the United States".

Appellant, however, does not point out how and wherein these rights have been allegedly “violated”. A search of the record is of no help since he is also raising these points for the first time on appeal.

Appellant was given adequate notice and an opportunity to be heard at all proceedings before the District Court, and as pointed out above a party is not guaranteed a right to counsel by the Constitution in civil cases although appellee contends that appellant *was* adequately represented by counsel in the Court below.

(D) Plaintiff’s Complaint Does State a Cause of Action as Found by the District Court and on Appeal From Default Judgment, Averments of the Complaint Must Be Accepted as True and Trial Court Need Not Hear Any Formal Evidence.

As determined by the District Court, appellee’s complaint does state a cause of action for relief under California Civil Code §3439.07 which provides:

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

Appellant’s brief attempts to speak of fraudulent misrepresentation actions (p. 10, lines 14-19); however, this was not plaintiff’s theory of recovery.

Plaintiff’s theory of recovery was under the afore-said Civil Code section via Section 70(e) of the National Bankruptcy Act [Title 11 U.S.C. § 110(e)] which gives the trustee the rights of any creditor under Federal or State law. This is the same theory ad-

vanced by the trustee in the case of *Eisenrod v. Utley*, (9th Cir. 1954) 211 F. 2d 678, which case is strikingly similar to the case at bar.

Appellant contends further that he should have been allowed to put on evidence at the default judgment hearing on November 30, 1967.

As will be noted from the provisions of Rule 55(b), the Clerk can enter default judgment when plaintiff's claim is for "a sum certain or for a sum which can by computation be made certain" and default judgment must be entered by the judge "in all other cases".

As will be noted from the Order for Default Judgment [R-408] the District Court determined that plaintiff's claim was for a sum certain or for a sum which can by computation be made certain within the meaning of Rule 55(b)(1). The District Court further found that, *in the event* such determination was error, that no evidence, as such, was necessary under Rule 55(b)(2) and the default judgment was also being entered by the Judge.

In the event the District Court was correct in its determination that the default judgment was properly entered by the clerk under Rule 55(b)(1) then it is submitted that there can be no question but that no hearing whatsoever was necessary and certainly no evidence could be submitted by appellant.

Appellant, however, argues that under Rule 55(b)(2) he was entitled to put on evidence *re* alleged offsets, etc.

Rule 55(b)(2) merely provides that the Court "*may* conduct such hearings or order such references as it deems necessary". This appears to leave it entirely

within the *discretion* of the District Court whether to hold any hearings at all on damages and certainly no hearing was necessary as *the District Court found that plaintiff's claim was a liquidated claim*. The cases cited by appellant hold that a hearing is necessary if the damages are unliquidated and even then a *hearing* is had—not a trial. *Creedon v. Randolph*, (5th Cir. 1948) 165 F. 2d 918; *Pope v. U.S.*, (1944) 323 U.S. 1; *Klapprott v. U.S.*, (3rd Cir. 1948) 166 F. 2d 273; *United States v. Borchers*, (2nd Cir. 1947) 163 F. 2d 347.

Also, the Court's attention is called to Rule 7(g) of the Rules of the United States District Court, Central District of California, which provides for the filing of affidavits under Rule 55(b)(2) situations to establish damages.

The present appeal is from a default judgment and on such an appeal the appellate court must accept the averments of the complaint as true. *Massa v. Jiffy Products Co.*, (9th Cir. 1957) 240 F. 2d 702, cert. den. 353 U.S. 947; *Northwestern Yeast Co. v. Broutin*, (6th Cir. 1943) 133 F. 2d 628.

(E) The Judgment Did Not Go Beyond the Complaint.

Appellant attempts to make the argument (as he did before the District Court) that plaintiff's complaint merely prayed for an accounting as to the First Cause of Action and therefore it was error to grant a money judgment.

However, the Court's attention is called to page 22, lines 9 through 12 of the complaint [R-22] which prays:

"That *judgment be had* against all Defendants for recovery of stock *and everything of value* received by them or their agents acting for them from and after May 5, 1960, for which they did pay to the bankrupt corporation full value." (Emphasis added).

(F) The Complaint Does, on Its Face, Show Damage Caused by Appellant.

Appellant further makes the argument (as he did before the District Court) that appellee's complaint does not show any damage because of the fact that it alleges Chase Capital received the Atwater Capital "debentures" of over \$800,000.00.

However, it is again pointed out to appellant (as it was before the District Court) that the next page of the complaint (p. 14, line 29 *et seq.*) alleges that said "debentures" or unsecured promissory notes are valueless, and in connection therewith the Default Judgment [R-407] provides that upon payment of said judgment the trustee is to return the Atwater "debentures" to defendant-appellant.

V.

CONCLUSION.

It is therefore respectfully submitted that this Honorable Court should affirm the judgment of the District Court as appellant's default cannot be set aside as he has not shown good cause within the meaning of Rule 55(c) F.R.C.P., nor has he shown that he has any meritorious defense to the action and the District Court therefore did not abuse its discretion in denying appellant's motion.

Further, the default judgment conforms to the complaint, and accepting all of the averments of the complaint as true, the default judgment must be affirmed.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN,

By ROBERT A. FISHER,

Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. FISHER

EXHIBIT A.

Order of May 28, 1968.

Superior Court of the State of California, for the County of Los Angeles.

May 14, 1968, Pearce Young, Judge, Department No. 110, R. C. Johnson, Clerk, Russ Williams. Reporter.

APPEARANCES:

(Parties and Counsel checked if present.)

(Counsel shown opposite parties represented.)

Case No. A218309, The People of the State of California, X Evelle J. Younger, District Attorney by B. Campbell and R. Corn Deputy, vs. X Vaughn Robert Antablin, X P. Caruso

It, appearing that the Minute Order of April 29, 1968 in Department 110 does not truly reflect the order of the Court on that date, it is now ordered corrected nunc pro tunc by adding after the words, "present sanity" the following: "Criminal proceedings suspended.". Matter comes on for sanity hearing. Karl Otto Von Hagen, Anthony DiNolfo, Fredrick Hacker, George Y Abe and Alvin E. Davis are sworn and testify for the defendant on issue. Sanity issue is argued. The Court finds the defendant is presently sane, can cooperate in his defense and does understand the nature of proceedings. Criminal proceedings are resumed.

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office. Attest Jun. 12, 1968, William G. Sharp, County Clerk and Clerk of the Superior Court of the State of California, for the County of Los Angeles. By Kathrene L. Mills, Deputy.

This Minute Order Was Entered May 20, 1968. William G. Sharp, County Clerk, and Clerk of the Superior Court.

N O. 2 2 6 6 8 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN LEVAIR JORDAN
ALVINA LaJAN JOHNSON,

APR 2 1969

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

FILED

MAR 31 1969

WM. B. LOCKE, CLERK

APPELLEE'S BRIEF

APPEAL FROM
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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF ISSUES

1. Was the arrest of defendant Jordan proper and was the subsequent search of his residence valid?

a. Did the information given to the agents by James Jordan taint the search of defendant Jordan's residence?

b. Was the arrest of defendant Jordan based upon probable cause?

c. Was the search of defendant Jordan's residence valid as a search incident to his arrest?

2. Is the statutory rule of evidence permitting conviction upon evidence of unexplained possession of heroin constitutional?

3. Is the statutory rule of evidence permitting conviction upon evidence of unexplained possession of marihuana constitutional?

4. Does §4705(a), of Title 26, United States Code, violate defendants' privilege against self-incrimination?

5. Was the delay in indicting the defendants a denial of defendants' due process rights?

6. Could the jury find that the evidence was sufficient from a qualitative test?

7. Did the court fail to instruct the jury that the indictment is not evidence of the guilt of the accused?

8. Did the court abuse its discretion by failing to grant a severance?

9. Did the court err in denying the motion for a mistrial after Agent Krueger testified as to defendant Jordan's refusal to give permission for a search?

10. Is the "concurrent sentence doctrine" valid?

II

STATEMENT OF FACTS

On April 24, 1967, Agent William Jackson, of the Federal Bureau of Narcotics, and an informant went to the vicinity of 35th Street and Jefferson Boulevard in Los Angeles. They picked up a man named Small and drove to the 900 block of East 35th Street and parked the car. Small and Agent Jackson exited the car and walked across the street to the passenger side of a gray 1967 Buick Riviera [R. T. 292]. ^{1/}

Agent Jackson gave Small \$320 of Government funds and Small reached in the window of the Buick and gave the money to defendant Jordan. Jordan gave Small a small rubber condom containing heroin which Small gave to Agent Jackson [R. T. 159, 293].

After dropping Small off, Agent Jackson and the informant met with surveillance agents and a Marquis reagent field test was performed on the substance in the condom, with positive results [R. T. 294].

On April 28, 1967, Agent Jackson met again with the informant and they rode to the area of 1200 East 25th Street and met Small. Small got into the car and they drove to Adams and Hoover Street where Small made a phone call. They then drove to the 900 block of East 35th Street and parked the car. A 1966

^{1/} "R. T. " refers to Reporter's Transcript of Proceedings.

golden colored Cadillac parked in front of the informant's car. Agent Jackson and Small went over to the Cadillac which was driven by defendant Jordan [R. T. 301].

Agent Jackson gave Small \$320 of Government funds which Small gave to defendant Jordan [R. T. 301-302]. Jordan gave Small a rubber condom containing heroin, which Small gave to Agent Jackson [R. T. 169, 302]. Agent Jackson asked defendant Jordan how much he would charge for a half ounce of cocaine and Jordan told him \$350 [R. T. 302].

Small and Agent Jackson returned to the informant's car and they then dropped Small off. Agent Jackson and the informant met with the surveillance agents. A Marquis reagent test was performed on the substance in the condom and a positive reaction was observed [R. T. 302].

On June 15, 1967, Agent Jackson and the informant drove to the 1200 block on East 25th Street [R. T. 303]. Small got into their car and they went again to Adams and Hooper where Small placed a phone call. They then proceeded to 42nd Place and Denker. Agent Jackson and Small went across the street to a gray Karmann Ghia in which defendant Johnson was sitting [R. T. 304].

Agent Jackson gave Small \$620 of Government funds and Small got into the car with defendant Johnson. He then gave the \$620 to defendant Johnson and she counted the money. She then reached up over the sun visor and took down a napkin wrapped package and gave it to Small [R. T. 304].

Small got out of the Karmann Ghia and gave the package to Agent Jackson. The package contained two rubber condoms containing heroin [R. T. 171, 304]. They then dropped Small off and met with surveillance agents and a Marquis reagent test was performed on the substance in the condoms with a positive reaction [R. T. 305, 307].

On July 27, 1967, Agent Joseph Krueger arrested James Jordan at the Terminal Annex Post Office, in downtown Los Angeles [R. T. 5]. James Jordan was arrested on the basis of an arrest warrant issued in the name of John Doe alias James Jordan [R. T. 21]. The basis for issuing the warrant in that name was the 1967 Riviera which was registered to James Jordan. The car was parked in front of James Jordan's address on April 24, 1967. The Cadillac used on April 28, 1967 was leased to a Jordan, and the general description of the man who sold to Agent Jackson fit him [R. T. 26, 27].

Agent Krueger took James Jordan back to the Federal Building and met with Agent Jackson [R. T. 7]. Agent Jackson looked at James Jordan and told Agent Krueger that he was not the man that he had purchased narcotics from [R. T. 25]. James Jordan was then told by Agent Krueger who asked him for his help [R. T. 25].

James Jordan directed them to the address of his brother Allen Jordan at 4527 West 64th Street [R. T. 9, 31-32]. Agents Krueger, Jackson and Paulus went to the door with James Jordan

and the bell was rung by Jordan. There was no answer. A short while later, defendant Johnson arrived in a late model Cadillac, parked and came to the door. She was placed under arrest pursuant to a warrant issued in the name of Jane Doe, alias Alvina Barryman, which was the married name of Miss Johnson. She was fully advised of her constitutional rights [R. T. 11-12].

She was asked where defendant Jordan was and she told the agents that he had taken the children some place [R. T. 16]. She was carrying two bags of groceries and she asked if she could put them in the kitchen (they had been standing on the porch) [R. T. 10, 15]. The agents told her she could and she asked them and her brother-in-law if they would like to take a seat in the living room, which they did [R. T. 15].

After putting the groceries away, she called Agent Krueger into the bedroom to ask his permission to put on some undergarments. In the bedroom, she told Agent Krueger that it would be all right for the agents and her brother-in-law to wait in the house for Jordan's return after she left to be taken downtown [R. T. 18, 19].

After she left, Jordan returned and was arrested on the basis of the warrant, which the agents believed still good, and on the basis of probable cause as Agent Jackson was present [R. T. 20, 21]. Jordan was advised of his constitutional rights following his arrest [R. T. 28, 29].

Agent Krueger asked defendant Jordan for permission to search his house and Jordan refused and, following discussion of

a search warrant. Agent Krueger then searched the premises and after searching the bedroom he came to a closet at which time defendant Jordan said, "You'll find it all there on the second shelf in a blue bag." Agent Krueger retrieved a blue airline flight bag which contained a quantity of several different types of narcotics [R.T. 179, 181].

III

ARGUMENT

- A. THE ARREST OF DEFENDANT, JORDAN WAS PROPER AND THE SUBSEQUENT SEARCH OF DEFENDANT JORDAN'S RESIDENCE WAS VALID AS A SEARCH INCIDENT TO HIS ARREST
-

1. THE INFORMATION GIVEN BY JAMES JORDAN AS TO DEFENDANT JORDAN'S RESIDENCE WAS NOT OBTAINED THROUGH IMPROPER POLICE ACTIVITY, AND DID NOT TAINT THE SEARCH OF DEFENDANT JORDAN'S RESIDENCE
-

The arrest of James Jordan at the Terminal Annex Post Office was a valid arrest pursuant to a valid arrest warrant.

"Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and

that the defendant has committed it "

Giordenello v. United States, 357 U.S. 480, at 485 (1957).

In the Giordenello case, supra, relied upon by the defendant, the court found that the complaint set forth only the conclusion of the complainant and was in no respect based upon his personal knowledge. Therefore, the court concluded that there was no probable cause to issue the complaint and the warrant would be invalid.

In the case at bar the complaint is a valid one and meets both requirements of Rules 3 and 4 above. The complaint [Exhibit #1, R. T. 454] sets forth that:

"Thomas Small; John Doe aka James C.

Jordan knowingly and unlawfully sold to Agent William R. Jackson of the Federal Bureau of Narcotics of [sic] 24.100 grams of heroin, a narcotic drug, which, as the defendants then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174. "

And the complainant states that this complaint is based on:

"I personally observed and have been informed of the above transaction. The substance which was sold by Small and aka

Jordan has been analyzed and found to contain heroin. "

This complaint was signed and sworn to by Agent Krueger.

This was a valid complaint setting forth both the essential facts constituting the offense charged and the probable cause that the named individuals committed it. Agent Krueger drew this complaint on good faith with reasonable grounds to believe that the individuals named in the complaint were in fact the individuals he had observed during the transaction. Agent Krueger based this belief on the fact that a 1967 Riviera used in the April 24th transaction was registered to James Jordan. It was parked in front of James Jordan's address on April 24, 1967, and the Cadillac used on April 28th was also leased to a "Jordan". Also the general description of the man who sold to Agent Jackson, under Agent Krueger's surveillance, fit James Jordan [R. T. 26, 27]. In fact, the defendant's opening brief calls James Jordan the defendant's "look-alike brother" (Appellants' Opening Brief, p. 12).

Therefore, when James Jordan was arrested he was arrested pursuant to a valid warrant and was properly brought to the Federal Building for questioning. When it was learned, that he was not the man who had sold to Agent Jackson he was released from custody and volunteered to cooperate with the agents in directing them to his brother [R. T. 25].

Even if it were to be conceded that the agents acted without authority in arresting James Jordan it would not appear

that his statements directing them to defendant Allen Jordan's residence could taint the product of the subsequent search of that residence under the doctrine of Wong Sun v. United States, 371 U.S. 471 (1962).

Under Wong Sun any statements obtained illegally, which may lead to any evidence, will be sufficient to cause the evidence to be suppressed from use against the person making those statements. Wong Sun v. United States, supra, at page 488. Here the only person who would have standing, if such statements were obtained illegally, would be James Jordan not the defendant Allen Jordan.

2. DEFENDANT WAS ARRESTED UPON
PROBABLE CAUSE AND THEREFORE
THE ARREST WAS VALID EVEN IF
THE WARRANT WAS DEFECTIVE

Conceding that the arrest of Allen Jordan was not made under the authority of a valid warrant, West v. Cabell, 153 U.S. 78 (1894), the arrest was still made upon reasonable grounds independent of the arrest warrant. 26 U.S.C.A. 7607. And the law is clear that an arrest made under the authority of a defective warrant may be justified by establishing the existence of probable cause for the arrest independent of the warrant.

Go-Bart v. United States, 282 U.S. 344 (1930);

United States v. Hall, 348 F.2d 837, 841-842

(2 Cir. 1965), cert. denied 382 U.S. 997 (1965);

Bell v. United States, 371 F.2d 35 (9 Cir. 1967);
Ferganchick v. United States, 374 F.2d 559
(9 Cir. 1967).

In fact, this Honorable Court in Bell v. United States,
supra, following and referring to United States v. Hall, supra,
stated:

"In that case there was a warrant which
the Government conceded to be invalid. It
argued, as it does in this case, that the arrest
was nevertheless lawful because of the existence
of the required reasonable grounds to believe that
the arrested person had committed the crime.
The defendant there urged that the fact that a
warrant, though an invalid one, had been obtained
conclusively demonstrated that there was sufficient
time to obtain a warrant and, that being so, the
arrest without a warrant was illegal.

"The court in Hall declined to 'impose
on the law of arrest a requirement thus far
confirmed to the law of search and seizure.'
Judge Friendly's opinion in Hall, at pages 841-
842, cites and quotes from the pertinent judicial
precedents and other writings and concludes
that the arrest was lawful and that the admissions
made by the defendant shortly after the arrest

were admissible in evidence. We agree with the Hall decision and opinion and will not further discuss it here. "

Bell v. United States, supra, p. 37.

Probable cause exists if the facts and circumstances known to the officer would cause a reasonable, cautious, and prudent man having the specialized knowledge of an enforcement officer to believe that a felony had been committed.

Draper v. United States, 358 U.S. 307 (1959);

Brinegar v. United States, 338 U.S. 160 (1949);

Burk v. United States, 287 F.2d 117 (9 Cir. 1961),

cert. denied 369 U.S. 841 (1961).

When the agents left the Federal Building, they thought they were still acting under a valid arrest warrant [R. T. 20, 21]. They had determined that the defendants were the tenants of a residence at 4527 West 64th Street [R. T. 505, 21-25, 506, 1-13, 31-32]. Both Agent Jackson and Agent Krueger were present at the arrest of the defendants [R. T. 23, 24]. Thus, the arrests were made on reasonable grounds as Agent Jackson was there to identify both defendants as the individuals from whom he had purchased narcotics and Agent Krueger had participated in the surveillance of the transactions [R. T. 20, 21].

3. THE SEARCH OF DEFENDANT
JORDAN'S RESIDENCE WAS VALID
AS A SEARCH INCIDENT TO A
VALID ARREST

As incident to a lawful arrest, a contemporaneous search is permissible and lawful of the premises where the arrest occurs, if the premises are under the control and possession of the arrested person. The permissible area of the search may extend to, and include, the entire premises under the arrested person's control and possession.

United States v. Rabinowitz, 339 U.S. 56 (1950);

United States v. Di Re, 332 U.S. 581 (1948);

Harris v. United States, 331 U.S. 145 (1947);

Williams v. United States, 273 F.2d 781

(9 Cir. 1960);

United States v. White, 342 F.2d 379 (4 Cir. 1965).

In the instant case, the agents had received permission from defendant Johnson to enter the residence and wait there for the arrival of defendant Jordan [R. T. 10, 15, 18, 19]. It had already been determined that this was the residence of the defendants [R. T. 505, 21-25, 506, 1-13, 31-32]. After arresting the defendant, when he came into the residence, Agent Krueger searched the house as a search incident to the defendant's arrest [R. T. 20, 28, 29, 404].

As this was a search incident to a valid arrest, it was not necessary for the agents to have obtained a search warrant. This

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case is not within the rule of Trupiano v. United States, 344 U.S. 699 (1952), as suggested by the defendants' opening brief. There the court was concerned with the situation where law enforcement officers had known for weeks the location of a farm where illegal activity was taking place and proceeded to search without a warrant.

In the present case, the agents left the Federal Building in an effort to find the defendants. They could not be sure they would find the defendants at this address and had no grounds for the issuance of a search warrant at that time.

B. THE STATUTORY RULE OF EVIDENCE
PERMITTING CONVICTION UPON EVIDENCE
OF UNEXPLAINED POSSESSION OF HEROIN
IS NOT UNCONSTITUTIONAL

It is clear that the provision in Title 21, United States Code, §174, which permits conviction upon a showing of unexplained possession of the narcotic drug heroin, functions as a " . . . statutory rule of evidence " Erwing v. United States, 323 F.2d 674, 679 (9 Cir. 1963). Cf. United States v. Gainey, 380 U.S. 63 (1965). As this Court said:

"Thus the function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drug, if indeed they were not illegally imported. This statutory rule of

evidence rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, was in fact imported contrary to law, plus (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to the facts as to their source that it is not unreasonable to require him to come forward with an explanation. Hernandez v. United States, 300 F.2d 114, 118, 119 (9th Cir. 1962). "

The Supreme Court and this Court have repeatedly upheld the rationality of this rule when dealing with heroin. Yee Hem v. United States, 268 U.S. 178 (1925). In Juvera v. United States, 378 F.2d 433 (9 Cir. 1967), this Court described the charge of unconstitutionality as " . . . an utterly groundless assertion. " When the challenge arose in a prosecution under Title 21, United States Code, §176(a), this Court rejected it. Zaragoza v. United States, 389 F.2d 468 (9 Cir. 1968).

In United States v. Gainey, 380 U.S. 63 (1965), an analogous statutory inference was sustained by the Supreme Court. It said:

" . . . the constitutionality of the legislation depends upon the rationality of

the connection 'between the facts proved and the ultimate fact presumed' [citation]. The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." (at pp. 66, 67.)

This Court recognized the rationality, when heroin is the narcotic drug, in two recent cases. Verdugo v. United States, No. 20,803 (9 Cir. 1968) slip opinion; Morgan v. United States, 391 F.2d 237, 238 (9 Cir. 1968). In both cases, the court relied upon statutory sources and common experience. It can, of course, also rely on its collegiate experience of many years and thousands of cases, like those cited, and like this one, where the evidence shows the foreign origin of the contraband.

The report by the U.S. Treasury Department, Bureau of Narcotics, for the year ended December 31, 1966, entitled "Traffic In Opium and Other Dangerous Drugs" states:

"There are two main currents of illicit traffic in opium and the opiates; one from the Middle East to North America; the other from southeast Asia to Hong Kong, Japan, China

(Taiwan) and the west coast of North America. Secondary flows include routes from Mexico to the United States. The American continent is a principal target of the illicit heroin traffic." (at p. 31.)

Granting the rationality of this rule of evidence, defendants have no standing here to raise it. The evidence established defendants in possession of heroin and the direct evidence supports a conclusion that the heroin was imported contrary to law and that the defendants knew it.

The adoption of defendants' position regarding the statutory rule would vastly increase the already great difficulty of controlling the illegal, clandestine traffic in heroin. The only beneficiaries would be the importers, distributors and wholesalers engaged in this illicit industry. The Constitution does not require, and sound policy forbids this result, unless a compelling, overriding interest can be shown. Congress and the President, in enacting these statutes, have said none exists, and defendants have not given this Court any reason to contradict that judgment.

The provision which reads ". . . unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction . . ." does not shift or change the burden of proof.

The statute and the presumption merely have the effect of shifting to the defendant the burden of going forward with evidence, i. e. with his defense. The burden of proof is always with the

Government to prove the defendant's guilt beyond a reasonable doubt.

Roviard v. United States, 358 U.S. 53, 63 (1957);
Chavez v. United States, 343 F.2d 85 (9 Cir. 1965);
Gonzalez v. United States, 162 F.2d 870
(9 Cir. 1947).

The provision which reads ". . . unexplained possession of a narcotic drug is sufficient evidence to authorize . . ." does not deprive the defendant of his Fifth Amendment right against self-incrimination. The defendant's right to remain silent is not infringed upon.

The defendant is neither required nor forbidden to testify by Title 21, United States Code, §174. The argument that this section violates the defendant's Fifth Amendment rights has been repeatedly rejected for many years. Indeed in Yee Hem v. United States, supra, the Supreme Court held:

"The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to

negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."

In United States v. Gainey, 380 U.S. 63, 70 (1965), the District Court instructed the jury regarding the statutory provisions authorizing the inference of guilt from the defendant's unexplained presence at a still site in a case where the defendant was convicted of illegal possession of a still. The Circuit Court held:

"We do not consider that the single phrase 'unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the

satisfaction of the jury' can be fairly understood as a comment on the petitioner's failure to testify. "

In Orozco-Vasquez, et al. v. United States, 344 F.2d 827 (9 Cir. 1965), the court pointed out that the contention that the provision in Title 21, United States Code, §174 requiring the defendant to explain possession of narcotics is unconstitutional and violates the defendant's Fifth Amendment rights against self-incrimination had been repeatedly held to have been without merit. See also:

Brown v. United States, 370 F.2d 374 (9 Cir. 1963);
Agobian v. United States, 323 F.2d 693 (9 Cir. 1963);
Cellino v. United States, 276 F.2d 941 (9 Cir. 1960);
Yee Hem v. United States, supra.

C. THE STATUTORY RULE OF EVIDENCE
PERMITTING CONVICTION UPON EVIDENCE
OF UNEXPLAINED POSSESSION OF MARI-
HUANA IS NOT UNCONSTITUTIONAL

Title 21, United States Code, §176(a) provides in pertinent part that:

"Whenever . . . the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession

to the satisfaction of the jury. "

This Court has held there is no merit in the contention that this presumption is unconstitutional. Jefferson v. United States, 340 F.2d 194, 199 (9 Cir. 1965). The presumption's validity has been affirmed repeatedly by this and other Circuit Courts. E. g. , Caudillo v. United States, 253 F.2d 513 (9 Cir. 1958), cert. denied, sub nom. , Romero v. United States, 357 U.S. 931 (1958); Hunter v. United States, 339 F.2d 425 (9 Cir. 1964); Borne v. United States, 332 F.2d 565 (9 Cir. 1964); Zaragoza v. United States, 389 F.2d 468 (9 Cir. 1968); Robinson v. United States, 327 F.2d 618 (8 Cir. 1964); Charles Toy v. United States, 266 Fed. 326 (2 Cir. 1920). (In Leary v. United States, 392 U.S. 903 (1968), certiorari has been granted as to this issue.)

The possession clause of §176(a) is not violative of the Fifth Amendment privilege against self-incrimination.

Defendants contend that the "possession" clause produces a statutory compulsion to testify or explain without any further constitutional safeguards irrespective of whether a cautionary instruction is given on possession. However, the approved Mathes and Devitt Jury Instruction dealing with the possession clause clearly points out that "defendant explains" does not mean "defendant testify". The instruction provides:

"To aid enforcement, Section 176(a) of Title 21, United States Code, further provides

that: 'whenever on trial for a violation of this . . . the defendant is shown to have or to have had possession of the marihuana, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. '

"However, this statute does not change the fundamental rule that the accused is presumed innocent until proved guilty beyond a reasonable doubt. Nor does it impose upon the accused any burden or duty to produce proof that the marihuana was lawfully imported, or any other evidence. As previously stated, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged.

"What the statute means is that, upon a trial for a violation thereof, if the jury should find beyond a reasonable doubt that the accused has had possession of the marihuana, as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the marihuana was imported or brought into the United States of America contrary to law; and to draw the further inference and find

that the accused had knowledge that the marihuana was imported or brought in contrary to law.

"In connection with any explanation offered for possession of the marihuana, you are reminded that, in the exercise of constitutional rights, the accused need not testify. Possession may be explained to the satisfaction of the jury through other circumstances, and other evidence in the case, independent of testimony of the accused" [R. T. 644, 645.]

Anthony v. United States, 331 F.2d 687 (9 Cir. 1964);

Medrano v. United States, 315 F.2d 361 (9 Cir. 1963);

United States v. Kapsalis, 313 F.2d 875 (7 Cir. 1963);

United States v. Norton, 310 F.2d 718 (2 Cir. 1962);

Ivey v. United States, 310 F.2d 227 (4 Cir. 1962), cert. denied 327 U.S. 929, 83 S.Ct. 873, 9 L.ed. 2d 733 (1963);

Perez v. United States, 297 F.2d 12 (5 Cir. 1961);

Teasley v. United States, 292 F.2d 460

(9 Cir. 1961);

See also: Brothers v. United States,

328 F.2d 151, (9 Cir. 1964);

Costello v. United States, 324 F.2d 260

(9 Cir. 1963), cert. denied 376 U.S.

930, 84 S.Ct. 699, 11 L.Ed.2d 650

(1964).

It is obvious that when the "possession" clause in issue is read in light of the accompanying possession jury instruction that such clause does not violate the Fifth Amendment privilege against self-incrimination.

D. SECTION 4705(a) DOES NOT VIOLATE
DEFENDANTS' PRIVILEGE AGAINST
SELF-INCRIMINATION.

Defendant's primary contention is that their conviction for sale of narcotics without obtaining the requisite order form from the buyer violated their privilege against self-incrimination. The relevant statute, Section 4705(a) of Title 26, United States Code, prohibits any sale of narcotic drugs unless the buyer furnishes "a written order . . . on a form . . . issued in blank for that purpose by the Secretary or his delegate." In support of their contention that compliance with this statutory requirement would have incriminated them thus rendering this Section unconstitutional, defendants cite three recent United States Supreme Court cases, Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

Marchetti, Grosso and Haynes expressly derived their basic rationale from Albertson v. S.A.C.B., 382 U.S. 70 (1965). In Albertson, the statutory requirement that Communist party members complete and file a registration form was held violative of the Fifth Amendment's prohibition of compulsory self-incrimination. The focal point of the Albertson decision was the finding that Communist registration statutes, rather than being "neutral on their face and directed at the public at large," were "directed at a highly selective group inherently suspect of criminal activities." Albertson thus enunciated the standard

that the Court was to follow in subsequent cases. Albertson v. S. A. C. B., 382 U.S. 70, 79 (1965); See Marchetti, supra, at 47; Grosso, supra, at 64; Haynes, supra, at 96.

Adhering to Albertson, the Court in Marchetti and Grosso, found that registration and tax requirements imposed on gamblers violated the Fifth Amendment. The fact that gambling was illegal in forty-nine states meant that registration requirements aimed at this selective group amounted to little more than a purposeful plan to gather evidence from citizens in order to aid in securing their convictions.

"Whatever else Congress may have meant to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use in their prosecution. "

390 U.S. at 74 (Justice Brennan concurring)

Similarly, in Haynes, compulsory registration of only those types of firearms (sawed-off weapons, machine guns, silencers) commonly used in illegal pursuits by a "selective group inherently suspect of criminal activities" was found violative of the Fifth Amendment.

"These limitations [length of weapon, silencers, etc.] . . . were apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation It is pertinent to note

that the Committee on Ways and Means of the House of Representatives, while reporting in 1959 on certain proposed amendments of the Act, stated that the 'primary purpose of [The Firearms Act] was to make it more difficult for the gangster element to obtain certain types of weapons. The type of weapon with which these provisions are concerned are the types it was thought would be used primarily by the gangster-type element. ' "

390 U.S. at 87-88, N. 4.

In striking down these regulatory provisions, the Court applied the general Fifth Amendment standard that to be invalid there must be a "real and appreciable" hazard of self-incrimination in the registration scheme. Grosso, supra, at 67; Rogers v. United States, 340 U.S. 367, 374 (1951). The Court made clear that such danger was found because, as in Albertson, rather than registration provisions aimed at effecting regulation of non-criminal as well as criminal activity ("neutral on their face and directed at the public at large") these regulations were designed to ferret out and coerce information from one selective group -- those engaged in illegal activities.

1. DEFENDANTS, AS SELLERS, WERE
NOT COMPELLED TO ACQUIRE
AN ORDER FORM NOR TO DIVULGE
ANY INCRIMINATORY INFORMATION

The order form provision under which defendants were convicted is designed to effectuate the congressional purpose that sales of narcotics be made only to authorized purchasers. The purchaser, never the seller, is under an obligation to apply for and obtain the order form and submit the required information. The only requirement imposed by Section 4705(a) upon the seller is that he not sell until the buyer provides a written order form obtained from the Government. Unlike the situations in Albertson, Marchetti, Grosso and Haynes, the seller is not required to pay any tax, submit any information to the Government, or file any registration application. Thus, Section 4705(a) compelled nothing of defendants; accordingly, the privilege against compulsory self-incrimination could not have been violated. Support for this conclusion is found in the leading post-Marchetti case, deciding that Section 4705(a) does not violate the Fifth Amendment.

"The statutory language makes manifest . . . that the purchaser of narcotics and not the seller is under compulsion to apply for and obtain the requisite order form. Even if we were to assume arguendo that the . . . purchaser's Fifth Amendment rights [are infringed] . . . it hardly follows that a

seller . . . is immune from prosecution for selling to a person who failed to provide the form. We need cite no authority for the principle that the privilege afforded by the Fifth Amendment is personal and that under the circumstances present here a seller cannot benefit from the privilege allegedly available to the buyer . . . [I]t is clear that standing under the Fifth Amendment is not freely negotiable nor transferable."

United States v. Minor, (2 Cir.) No. 31953,
July 3, 1968, at 2954-55.

Insofar as defendant intimates that the privilege would be violated by the administrative regulation requiring the seller to file and keep the buyer's order form in his possession, it would be a sufficient answer that defendants were not charged with violation of this regulation. Even if this were not so and if other provisions were to be found constitutionally suspect, Section 4705(a) can be effectively enforced apart from these other provisions, thus freeing it from constitutional impediment. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936), (concurring opinion of Justice Brandeis), cited in Haynes, supra, at 92. It should also be noted that Title 26, United States Code, Section 7852(a), provides:

"If any provision of this title, or the application thereof to any person or circumstances,

is held invalid, the remainder of the title, and the application to other persons or circumstances, shall not be effected thereby."

2. APPLYING THE CONSTITUTIONAL
GUIDELINES OF RECENT SUPREME
COURT DECISIONS, SECTION 4705(a)
DOES NOT EVIDENCE A STATUTORY
SCHEME CREATING SUBSTANTIAL
RISK OF SELF-INCRIMINATION

Even viewing Section 4705(a) in the light of defendants' shifting of the possibility of incrimination from buyer to seller, that Section's validity is not affected by the recent Supreme Court decisions discussed above. Those cases were cases where defendants were compelled to give incriminating information demanded by statutory schemes aimed only at select groups known for their criminal activity. In effect, the statutes struck down by the Court were primarily concerned with "asking all thieves in the room to stand up". In sharp contrast, Section 4705(a) is aimed primarily at the regulation of the legitimate market in narcotics:

"Controls on domestic trade in narcotic drugs directly apply to people who handle, sell, or dispense narcotics for lawful medical purposes; such as physicians, hospitals, pharmacists, retailers, and others."

Report on the Traffic in Opium and Other

Dangerous Drugs, 166, Bureau of Narcotics,
(hereinafter cited as "Annual Report")

The multi-million dollar narcotics business is, to a large extent, legal. This vast legal industry is actively regulated by the Federal Bureau of Narcotics during all stages of legitimate distribution, pursuant to comprehensive and inter-related statutes and regulations. See, e.g., 21 C.F.R., Pages 302-307. Through the order form and registration provisions of the narcotics laws, the Bureau closely regulates the domestic distribution among importers, manufacturers, wholesalers, retailers, medical practitioners, hospitals and researchers. That these provisions are designed to regulate legitimate transactions in narcotic drugs is borne out by the fact that, as of December 1966, there were 394,193 registrants under the narcotics laws who were authorized to obtain written order forms from the Government and engage in legitimate transactions in narcotic drugs. See 1966 Annual Report, supra, at 44. Rather than a group "inherently suspect" of criminal activities, this group of nearly 400,000 registrants, contained only one person who was charged with a federal narcotics violation in 1966. See 1966 Annual Report, supra, at 10. Thus, these order forms and other related provisions are regulatory in nature, providing legal methods and procedures for carrying on the legal business of sale and distribution of narcotic drugs.

That the order form provisions of the federal narcotic laws are designed to legitimize, not to incriminate, is

substantiated by the case law in this area. The United States Supreme Court has found that:

"These order form provisions constitute a needed check on illegal sales, and they are distinctly helpful in the detection of any attempted dealing in, or selling of, the drug free from the tax . . . to punish him for this misuse of the order form is not to punish him for not recording his own crime."

Nigro v. United States, 276 U.S. 332, 346-51 (1928).

In the recent Second Circuit case of United States v. Minor, supra, Section 4705(a) was held not to violate a heroin seller's Fifth Amendment privilege, because only the buyer was required to apply for a form. The Court went on to uphold the statute as applied to a heroin seller, distinguishing it from the statutes in Marchetti, Grosso and Haynes:

"And, we believe that Section 4705(a) serves an important function within the statutory scheme . . . requiring that sales be made only to persons who have acquired and are able to produce Treasury forms ensures that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes. . . . Section 4705(a) ensures that narcotics do not fall into the hands

of those who, for one reason or another, cannot satisfy the registration requirements of Section 4722. And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs. . . .

"In Marchetti and Grosso the Court placed great emphasis on the wide prohibition against gambling under both federal and state law . . . and stressed that the gambling statutes were directed at a 'selective group inherently suspect of criminal activities' . . . the firearm registration statutes before the Court in Haynes had the even more apparent purpose of gathering information from possible criminals in order to secure their conviction of various crimes . . .

"Section 4705(a), on the other hand, cannot be said to be directed primarily at those 'inherently suspect of criminal activities' [I]t was one section of an important and significant statutory scheme regulating the conduct of a lawful business."

United States v. Minor, (2 Cir.) No. 31953,
July 3, 1968, at 2957-60.

Prior to Marchetti, Grosso and Haynes, this Court upheld the statutory order form requirements relating to the sale of marihuana, 26 U.S.C. §4742(a); Browning v. United States,

366 F.2d 420, (9 Cir. 1966). See also Ruiz v. United States, 328 F.2d 56 (9 Cir. 1964). It should be noted that in these cases, this Court was faced with similar self-incrimination contentions as proposed here by defendants and that the order form provision for marihuana is essentially the same as Section 4705(a).

On the same day that certiorari was granted in Marchetti, certiorari was denied for a marihuana case in which similar Fifth Amendment issues were decided adversely to the defendant. Rule v. United States, 362 F.2d 215 (5 Cir. 1966), cert. denied 385 U.S. 1018 (1967).

After the Marchetti, Grosso and Haynes decisions, Section 4705(a) was found constitutional in the Second Circuit Minor case, supra. The Fifth Circuit upheld the constitutionality, on the same grounds as Minor, of the order form requirement for marihuana sales, even though there the buyer was the defendant. Leary v. United States, 392 F.2d 220 (5 Cir. 1968), cert. granted 392 U.S. 903 (1968). Similarly, Judge Wyzanski has recently upheld the marihuana order form's constitutionality under the Fifth Amendment. United States v. Vial, 282 F.Supp. 472 (D. Mass. 1968). See also United States v. Reyes, 280 F.Supp. 267 (S.D.N.Y. 1968); c.f. United States v. McGree, 282 F.Supp. 550 (N.D. Tenn. 1968).

Defendant, in essence, fictitiously poses a statute which requires a seller to submit incriminating evidence, such requirement having as its target the illegal sale of narcotics by

the select group of those involved in such criminal activity. No such statute is at issue. In fact, there can be no case of registration of any illegal narcotics sale, simply because any request for an order form would be denied. Illegality thus precludes registration. This contrasts sharply with the Marchetti-Grosso situation where gamblers engaged in illegal activity were compelled to register and thereby incriminate themselves. There, illegality was in effect the factor prompting the registration requirement. Under Section 4705(a), incrimination, far from being "a real and appreciable hazard" is quite impossible -- i. e. , since order forms are reserved for legal sales of narcotics, they will necessarily be absent in illegal sales; they cannot incriminate in such sales. This follows from the fact that Section 4705(a) is designed to legitimize sales rather than record illegal sales.

E. THE LAPSE OF TIME BETWEEN THE
FIRST SALE AND THE NOTICE TO THE
DEFENDANTS WAS NOT A DENIAL OF
DUE PROCESS

The offenses charged in the indictment are governed by the five-year statute of limitations in Title 18, United States Code, §3282. This period of time is usually considered the primary guarantee against bringing overly stale charges. United States v. Ewell, supra, at 122, 383 U.S. 116 (1966).

While the statute of limitations is the primary guarantee to assure the expeditious handling of criminal cases prior to indictment, an unreasonable delay between the date of the offense and the filing of the indictment could be so oppressive as to constitute a denial of due process. Nickens v. United States, 323 F.2d 808 (D.C.Cir. 1963). This Court has recognized the long-standing rule that the Sixth Amendment right to a speedy trial attaches only after a formal criminal charge has been lodged against a defendant, and that it is only in cases where special circumstances exist that a due process right may attach some time before formal accusation (emphasis added).

United States v. Lucas, supra, at 502-503,

363 F.2d 500 (9 Cir. 1966);

United States v. Venus, 287 F.2d 304 (9 Cir.

1960).

While this Court has not expanded on the exact meaning of special circumstances, the Court did point out in Lucas that

it found nothing purposeful, oppressive, or prejudicial in the Government's delay. Other Circuits have held in line with the rationale expressed in Lucas that before the defendant's due process rights were infringed, there must be a showing that there was: (1) an unreasonable delay; (2) prejudice caused the defendant as a result of the delay; and (3) purposeful oppressive and vexatious action on the part of the Government in causing the delay.

United States v. Sanchez, 361 F.2d 824

(2 Cir. 1966);

Foley v. United States, 290 F.2d 562

(8 Cir. 1961).

The defendants cite Ross v. United States, 349 F.2d 210 (D.C. 1965) and Woody v. United States, 370 F.2d 214 (D.C. 1966) to support their proposition that the delay in notifying the defendants was a denial of due process. A reading of both these cases indicates that they were an attempt by the Court to sanction bad police work.

In the instant case, the agents acted reasonably in the handling of the case. There were three transactions, the first taking place April 24, 1967 [R.T. 292], the second April 28, 1967 [R.T. 301], and the third on June 15, 1967. There is no showing of any unreasonable delay or purposeful action on the part of the Government in the delay between the original transactions and the indictment which was filed in August, 1967 [C.T. 61].^{2/}

^{2/} "C.T." refers to Clerk's Transcript of Record.

F. THE PROSECUTION ONLY HAD TO SHOW
THAT SOME MEASURABLE AMOUNT OF
A NARCOTIC DRUG WAS IN FACT THE
SUBJECT OF THE ACTS CHARGED IN
THE INDICTMENT

The law in the Federal Courts does not require that a quantative as well as a qualitative test be performed on the substance which is the subject of the indictment. All that must be shown is that some measurable amount of the narcotic drug was contained in the substance.

Cromer v. United States, 142 F.2d 697, 698

(D. C. 1944), cert. denied 322 U. S. 760

(1944);

United States v. Wanton, 380 F.2d 792 (2 Cir. 1967).

G. THE COURT DID NOT FAIL TO INSTRUCT
THE JURY THAT THE INDICTMENT IS NOT
EVIDENCE OF THE GUILT OF THE ACCUSED

The Court in its instruction of the jury instructed them that an indictment was no evidence.

"An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt."

[R. T. 623.]

H. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION BY FAILING TO GRANT A
SEVERANCE

Joinder of defendant in the same indictment was proper since they participated in the same series of transactions.

Federal Rules of Criminal Procedure, Rules 7-8; Williamson v. United States, 310 F.2d 192 (9 Cir. 1962); United States v. Hoffa, 349 F.2d 42 (6 Cir. 1965); Nelson v. United States, 375 F.2d 740 (9 Cir. 1967).

Since joinder in the indictment and for trial was proper, defendants had the burden of showing prejudice resulting from the joinder in order to invoke the trial court's discretion and obtain a severance. In the absence of an affirmative showing that prejudice will result so as to deprive defendant of a fundamentally fair trial, a motion for severance should be denied.

Sagansky v. United States, 358 F.2d 195 (2 Cir. 1966); cf. Williamson v. United States, 310 F.2d 192 (9 Cir. 1966).

A general, unsupported allegation of prejudice is not sufficient to warrant severance of counts that are properly joined. United States v. Haun, 218 F.Supp. 923 (S.D.N.Y. 1963).

The right to a severance rests with the sound discretion of the trial court. Pointer v. United States, 151 U.S. 396, 400 (1894); United States v. Garrison, 265 F.Supp. 112 (1967); United States v. Hoffa, 349 F.2d 43 (6 Cir. 1965). Absent an affirmative showing of an abuse of discretion, refusal to sever is not assignable as error. Stilson v. United States, 250 U.S. 583

(1919); Mendez v. United States, 349 F.2d 650 (9 Cir. 1965),
cert. denied, 384 U.S. 1015 (1966). A fortiori, the trial court
is not required to grant a severance, sua sponte, absent a showing
of prejudice, as distinguished from a conclusory statement that
prejudice resulted. Russell v. United States, 288 F.2d 520 (9 Cir.
1961), cert. denied, 371 U.S. 926 (1962).

Appropriate instructions can obviate any possible confusion
between the two defendants to be tried, and confine the jury's
consideration to evidence produced as to each particular defendant.
Spencer v. Texas, 385 U.S. 554 (1967); Delli Paoli v. United States,
352 U.S. 232, 242 (1957).

The defendants imply that a failure to sever was prejudicial
under the doctrine of Bruton v. United States, 391 U.S. 123 (1968).
In that case, the Supreme Court held where a co-defendant does
not testify, and his confession is admitted which implicates
other defendants on trial, then there is a deprivation of the right
to be confronted by one's accusers and reversal is required. In
Bruton, neither defendant testified or offered any evidence at the
trial. Evans v. United States, 375 F.2d 355 F. 2 at 357 (8 Cir.
1967).

In the instant case neither defendant was denied his right of
confrontation as both defendants took the stand. It was also problem-
atical whether reversal would have been required under the
retroactive application of Bruton if both defendants had not testified,
as neither of the defendants' statements implicated the other.

I. THE COURT DID NOT ERR IN DENYING A MISTRIAL AFTER AGENT KRUEGER TESTIFIED THAT DEFENDANT JORDAN STATED THAT HE WOULD NOT GIVE PERMISSION TO SEARCH THE RESIDENCE.

Following the arrest of defendant Jordan, after he entered his residence (R. T. 404), he was advised of his constitutional rights and indicated that he understood them (R. T. 407, 408). He then asked if the agents had an arrest warrant or a search warrant (R. T. 404, 408). Agent Krueger advised him that he was going to have to search his residence and asked him for permission to do so and defendant Jordan refused to give him permission (R. T. 404-405). It is this refusal which is raised as grounds for reversal by the defendant.

It is conceded by the Government that a valid exercise of one's constitutional rights should not be used against the claimant. But here there is no exercise of any constitutional right. The defendant had already been informed of his rights following his arrest and had indicated he understood them. The defendant then initiated discussion of the arrest and search warrants. There is no indication that his statements were involuntary. Therefore, it appears that his response did not violate any of his Fifth Amendment rights. See Miranda v. Arizona, 384 U.S. 436 (1965). Nor did his refusal to give his permission for the search violate his rights under the Fourth Amendment. He had no right to be free from the search as it

was a valid search incident to his arrest (See Argument A of this brief).

It should also be noted that this refusal by the defendant was adverted to in a non-responsive answer by Agent Krueger (R. T. 404). It was not, as insinuated by the defendant, intentionally solicited by the Government. Moreover, the Judge, at the request of the defendant, admonished the jury that "no inference whatever is to be taken against an individual for in any way exercising or asserting his constitutional rights, rights guaranteed under the Federal Constitution". (R. T. 405). However, the Judge made no finding that any constitutional rights had been violated.

Under the circumstances, assuming this statement was not properly before the jury, it was harmless error. The effect of the statement was nullified by Jordan's later voluntary and unsolicited admission made as Agent Krueger started to search the hall closet:

"Q. Getting back to the time when you approached the closet, what happened then?

A. I approached the hall closet which is just off the living room and in view of Mr. Jordan and Mr. Jackson, I believe, at that time.

I opened the door and Mr. Jordan turned to me and said, 'You will find it all there on the second shelf.'

I looked on the second shelf and

observed a blue flight bag, such as used by the airlines.

"I removed the flight bag and brought it to the living room and set it down on the table in front of Mr. Jordan and I removed the contents and found a quantity of various contraband."

(R. T. 409) (This contraband was the basis for Counts X and XI).

There can be no doubt that the statement by the defendant indicating the location of the contraband was the evidence from which the jury inferred that defendant had guilty knowledge, and not his refusal to consent to the search which the jury had been instructed to disregard.

J. THE "CONCURRENT SENTENCE DOCTRINE"
 IS VALID

Where a defendant is sentenced to the same period of incarceration on more than one count and the sentences are to run concurrently, the fact that the appellant was validly convicted on any one count precludes reversal regardless of the validity of the convictions on the other counts.

Hirabayashi v. United States, 320 U.S. 81 (1943);

Sherman v. United States, 320 F.2d 137, 156

(9 Cir. 1963);

Noah v. United States, 304 F.2d 317, 318

(9 Cir. 1962);

Bech v. United States, 298 F.2d 622, 626

(9 Cir, 1962);

Russell v. United States, 288 F.2d 520, 521

(9 Cir. 1961).

It should be noted that Benton v. Maryland, No. 201, October Term, 1968, was reargued March 24, 1969, before the United States Supreme Court, on the question of the continuing validity of this rule of law.

IV

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of defendants Johnson and Johnson should be affirmed.

Respectfully submitted,

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NO. 22669

IN THE
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FOR THE NINTH CIRCUIT

STATE OF ARIZONA, ex rel.,)
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County Attorney,)

Petitioners and)
Appellants,)

vs.)

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FOR THE DISTRICT OF ARIZONA)
and WALTER E. CRAIG, a Judge)
thereof,)

Respondents and)
Appellees.)

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NOTE

Due to the press of time it was not possible to completely check ultimate disposition of all cases prior to completing Brief. However, the index of cases, it is believed, reflects this history with reasonable accuracy.

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STATEMENT OF THE JURISDICTIONAL
PLEADINGS AND FACTS

Hooper and Scroggs Case

A complaint was filed in the United States District Court by Ron Kent Hooper and Purvis Ole Scroggs as plaintiffs against Honorable William H. Gooding, Judge of the Superior Court of Maricopa County, Arizona and the State of Arizona by Robert Corbin, County Attorney of Maricopa County, Arizona, seeking a temporary restraining order restraining Gooding and Corbin from proceeding with an open preliminary hearing pending hearing upon Plaintiffs' Motion for a Preliminary Injunction. The complaint also sought a permanent injunction against a further preliminary hearing until the defendant, Gooding, should exercise his discretion in the matter as to whether the hearing should be open or closed.

The complaint alleged that the

plaintiffs were each citizens of the United States and residents of Phoenix, Arizona. Hooper was alleged to be a duly licensed member of the State Bar of Arizona.

Gooding was sued in his official capacity as Judge of the Arizona Superior Court and Corbin in his official capacity as County Attorney of Maricopa County, Arizona.

It was alleged that criminal proceedings were pending against the plaintiffs in the Superior Court of Maricopa County and that Judge Gooding was sitting as a committing magistrate to determine if probable cause existed to bind the plaintiffs over for trial in the Maricopa County Superior Court.

The plaintiffs alleged that evidence had been received by Judge Gooding as to the nature of the accusations against plaintiffs as part of preliminary hearing motions and that on the basis of this testimony the plaintiffs, as defendants in the state

criminal actions, were entitled to and moved the magistrate for an exclusionary order barring all persons from the hearing except court officers and witnesses, when testifying.

Judge Gooding, it was alleged, found that plaintiffs would be damaged as to their professional and business reputations and would be otherwise damaged but held that he had no power to close the hearing.

Plaintiffs alleged that the Arizona Supreme Court refused to entertain a Petition for a Writ of Mandamus directed to Judge Gooding and that the constitutional rights of the plaintiffs under the Sixth, Ninth and Fourteenth Amendments to the United States Constitution would be violated if the hearing was not closed. The plaintiffs then alleged that the refusal of Judge Gooding to exercise his discretion amounted to action under color of state law.

Jurisdiction in the District Court to

entertain and act upon plaintiffs' complaint was asserted to flow from Section 1343, Title 28 and Section 1983, Title 42, United States Code. District Judge Craig issued a temporary restraining order and after hearing, a preliminary injunction, to be more fully reviewed in connection with the Concise Statement of the Case.

The State of Arizona and Robert Corbin as County Attorney has appealed from the original order entered by Judge Craig, by Notice of Appeal filed in the District Clerk's office March 15, 1968, and from the Findings of Fact, Conclusions of Law and Order and Judgment, entered March 20, 1968, by Notice of Appeal filed March 20, 1968.

Jurisdiction in the Court of Appeals to entertain this appeal flows from the provisions of Section 1292, Title 28, United States Code.

Jurisdiction in the Court of Appeals to entertain the Petition for a Writ of Mandamus, or alternatively, a Writ of Prohibition, flows from the All Writs statute, Section 1651, Title 28, United States Code.

Borquez Case

The complaint in the Borquez case tracks the Hooper and Scroggs complaint in rather minute detail. A Justice of the Peace, Ida Westfall, is the judicial defendant and Borquez, the plaintiff, is alleged to be a juvenile released by the Juvenile Court to the Maricopa County authorities for prosecution as an adult for murder.

District Judge Craig issued a temporary order also tracking the Hooper and Scroggs preliminary order and set a hearing on issuance of an interlocutory order for March 13, 1968.

Prior to that date these proceedings

were instituted and there has therefore been no interlocutory order issued. In this respect the cases, procedurally, are in a different posture.

The jurisdiction asserted in the District Court is again Section 1343, Title 28, United States Code and Section 1983, Title 42, United States Code.

Jurisdiction in the Court of Appeals to entertain the Petition rests upon the All Writs statute, Section 1651, Title 28, United States Code.

CONCISE STATEMENT OF THE CASE

Two complaints were filed in the State Court of the State of Arizona by the County Attorney of Maricopa County, Arizona, in one case charging Ron Kent Hooper and Ole Purvis Scroggs as defendants with the crime of Receiving Stolen Property and in the other charging Danny Borquez with the crime of

murder.

The Hooper and Scroggs case was assigned to Judge William H. Gooding, a Superior Court judge, as a magistrate for preliminary hearing, to determine if there was probable cause to hold the defendants for trial in the Superior Court for the charged crimes. The Borquez case was assigned to Justice of the Peace, Ida Westfall, as a magistrate for a like purpose.

Prior to the taking of evidence in each case the defendants moved for an exclusionary order requiring that all persons, other than court officials, witnesses when testifying, counsel and the parties, be removed from and remain outside the courtroom. The basis for the motion in each case was alleged interference with the defendants' right to an impartial jury, if held to answer and, further, that the respective defendants' professional, business

and general character reputations would be irreparably damaged and their right of privacy illegally invaded.

Judge Gooding, on the basis of certain evidence theretofore received by him in hearings on motions, found that an exclusionary order should be entered but that he lacked jurisdiction to enter such an order.

It is alleged in the Borquez case that Justice of the Peace Westfall made like findings and also refused to enter an exclusionary order because of lack of jurisdiction so to do.

Prior these hearings Rule 27, Arizona Rules of Criminal Procedure, had read as follows:

"During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined.

The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court."

On January 29, 1968, the Arizona Supreme Court amended Rule 27, effective February 1, 1968, by striking therefrom the last sentence thereof.

The evidence upon which Judge Gooding acted in concluding as he did and upon which Justice of the Peace Westfall concluded as she is alleged to have concluded was not before the District Judge and is not part of the record.

Hooper and Scroggs first filed suit in the United States District Court for the District of Arizona for injunctive relief restraining the Superior Court judge from proceeding with an open preliminary hearing until the judge exercised his discretion as to whether the hearing should be open or closed.

The order announced from the bench,

after hearing, by Judge Craig, ordered a preliminary injunction prohibiting an open preliminary hearing as to Hooper and Scroggs "until such time as the Arizona Supreme Court may have an opportunity to clarify the interpretation of Rule 27, as amended." The Court also instructed the County Attorney to institute "appropriate proceedings" in order for the Supreme Court of Arizona to clarify Rule 27, as amended.

The formal Findings of Fact, Conclusions of Law and Order and Judgment, signed and entered some ten days later, after this cause was filed in the Circuit Court, over the objections of the State of Arizona and the County Attorney, enlarged upon and embellished the order of March 8, 1968. The Order and Judgment is materially different from the Order announced from the bench.

The District Judge, in effect, exercised the asserted discretion of the Arizona

Superior Court judge, for the injunction ran against holding any further open preliminary hearing in the Hooper and Scroggs case pending clarification by the State Court of Rule 27.

The formal, written order requested that the County Attorney institute an appropriate proceeding to procure an Arizona Supreme Court ruling as to the discretion of magistrates to hold closed preliminary hearings. The injunction was made "effective pending clarification of the interpretation of Rule 27 of the Rules of Criminal Procedure for the State of Arizona, as amended by the Supreme Court of Arizona."

The Borquez case was pending for hearing when this proceeding was instituted, hence no formal or other findings were made by the District Court.

While the various factual findings made by the District Judge and the magistrate, Gooding, find little support in any evidence,

for the purposes of this appeal they may be assumed as true.

They are:

1. There had already been substantial pretrial publicity about each case.

2. The principal witness for the prosecution in the Hooper and Scroggs case had admitted to numerous convictions for sexual and drug offenses.

3. The principal witness for the prosecution in the Hooper and Scroggs case had admitted to bargains made with law enforcement officers to dismiss nearly thirty charges pending in Arizona against her and her husband.

4. The principal prosecution witness had made extremely derogatory remarks about Hooper's legal ability.

5. That evidence would be produced at the preliminary hearing which very well might not be admissible at the time of trial,

if there was a trial.

6. That one of the defendants in the cause before the Court was a professional man; that the other was a businessman; that any publicity in connection with the matters then before the Court would be detrimental to their professional and business reputations, and affect their livelihoods.

7. That the amendment to Rule 27 of the Arizona Rules of Criminal Procedure constituted a mandate from the Supreme Court of Arizona that a judge of the Superior Court of Arizona or a Justice of the Peace sitting as a magistrate could not in its discretion exclude all persons from a preliminary hearing. (Magistrate Gooding).

8. That if publicity were distributed generally with respect to the evidence submitted at the preliminary hearing in the State Court the defendants in the State Court proceeding might well suffer irreparable injury; that in the event of general publicity of the

matters presented at the preliminary hearing in the State Court proceeding there might well be a likelihood that a fair and impartial jury might not be obtainable in a trial in Maricopa County or adjacent counties.

9. Plaintiffs in this cause had exhausted their state remedies in the state courts.

The Borquez case is pending in the District Court upon the preliminary order issued by the District Judge upon the verified complaint of Borquez. The preliminary order found that the Justice of the Peace had inherent power to order a closed hearing for good cause, that substantial constitutional questions were presented and that Borquez had exhausted his state remedies. Accordingly the state magistrate was ordered to refrain from any further open preliminary hearings until March 13, 1968, at 11 o'clock a.m. or until further order of the Court, at which

time the parties were directed to appear "for argument of the matter presented in this cause."

The Attorney General of the State of Arizona thereupon prepared and presented the Petition of the State of Arizona and its County Attorney, Robert Corbin, for a Writ of Mandamus or Prohibition, as the Court might determine applicable to correct this misuse of judicial power by the District Court.

The Court of Appeals directed that the matter be considered and treated both as an appeal on the merits from an order granting an interlocutory injunction and as a Petition for an extraordinary writ.

Accordingly Petitioners filed a Notice of Appeal to the Court of Appeals on March 15, 1968, and following the entry of the Findings of Fact and Conclusions of Law and Order and Judgment, filed a further Notice of Appeal to the Circuit Court of Appeals March 20, 1968.

SPECIFICATIONS OF ERROR RELIED UPON

SPECIFICATION OF ERROR I

The District Judge erred in accepting jurisdiction and granting an injunction staying state court action contrary to the restrictions imposed upon such action by Section 2283, Title 28, United States Code, for the reason such injunction was not

- (a) expressly authorized by Act of Congress;
- (b) necessary in aid of the District Court's jurisdiction; or
- (c) necessary to protect or effectuate its judgments.

SPECIFICATION OF ERROR II

The District Judge erred in granting an injunction and staying State court action for the reason there was no showing of clear and imminent irreparable injury sufficient to warrant federal interference with State court

action.

SPECIFICATION OF ERROR III

The District Judge erred in granting an injunction staying State court action for the reason the plaintiffs (defendants in the State court) had an adequate remedy for relief, if justified, and had not exhausted their state remedies, i.e., by Motions to Quash the Information addressed to the trial court and by appeal to the state appellate courts if necessary. Further, a Writ of Mandamus does not lie to control discretion of an inferior tribunal or to review error in interlocutory orders within the jurisdiction of the inferior tribunal.

SPECIFICATION OF ERROR NO. IV

The District Judge erred in granting an injunction staying State court action for the reason that the complaints affirmatively showed on their face that substantially the same relief had been sought by plaintiffs in both the Arizona Court of Appeals and the Arizona Supreme Court and had been refused

plaintiffs by the Arizona appellate courts. This constituted a State court interpretation of Arizona law that either the magistrate had no inherent power to close a hearing because of Article 2, Section 11 of the Arizona Constitution or that there was no sufficient showing of clear, imminent and irreparable injury to plaintiffs such as warranted denying the public the right and liberty of observing the court processes of the Arizona Courts as guaranteed by both the United States and the Arizona Constitutions. In either event, the error of the Arizona Courts, if in fact error was committed, is not subject to review by a United States District Court under its equity powers.

SPECIFICATION OF ERROR NO. V

The District Judge erred in assuming jurisdiction as to each complaint upon the authority of Section 1983, Title 42, United States Code, for the reasons

- (a) said statute is inapplicable to the State of Arizona, a Superior Court or Justice of the Peace and a County Attorney;
- (b) the ruling of a magistrate refusing to close a preliminary hearing to the public pursuant to such magistrate's interpretation of state statutes does not constitute action by a "person" under color of a statute, ordinance, regulation, custom or usage of a state;
- (c) A Superior Court Judge, Justice of the Peace and County Attorney are not "liable" under Section 1983 to suit at the instance of a "party injured" when acting within their judicial or quasi-judicial authority and jurisdiction.

SPECIFICATION OF ERROR NO. VI

The District Judge erred in assuming

jurisdiction as to each complaint upon the authority of Section 1343, Title 28, United States Code, for the reason that the refusal of each magistrate to construe Rule 27, Arizona Rules of Criminal Procedure, as amended, and the Arizona constitutional provision, Article 2, Section 11, as allowing a magistrate inherent power to order a closed preliminary hearing does not constitute "deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" nor does it amount to ground for equitable relief under any Act of Congress providing for protection of civil rights.

SPECIFICATION OF ERROR NO. VII

The District Judge erred in finding (p. 1, lines 21-29, Findings of Fact, Conclusions of Law and Order) that "both counsel

(counsel for Ron Kent Hooper and Purvis Ole Scroggs and for State of Arizona and Robert Corbin, as County Attorney) concurred that if * * Honorable William H. Gooding * * had inherent power to exclude the public * * the cause referred to was an appropriate cause for the Court to exercise its discretion in favor of a closed hearing" for the reason that there is no evidence in the record to support such a finding.

SUMMARY OF ARGUMENT

I

Section 2283, Title 28, United States Code, provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Neither Section 1983, Title 42, United States Code nor Section 1343(3) and (4), Title

28, United States Code, is an Act of Congress expressly authorizing a Court of the United States to grant an injunction to stay proceedings in a State court.

II

Even if either Section 1983 or Section 1343 be construed to constitute such an express authorization there was no showing, either by verified complaint or by evidence of an exceptional case demonstrating clear, imminent and irreparable damage to any plaintiff in the District Court flowing from a violation of any federal constitutional rights of such plaintiff as warranted a Federal court in interfering with and embarrassing routine State court criminal proceedings.

III

Mere speculative possibility that

- (a) evidence which very well might not be admissible at the time of trial would be produced at the preliminary hearing;

(b) if publicity is distributed generally with respect to evidence admitted on the preliminary hearing the defendants in the State court proceeding "might well suffer irreparable injury";

(c) in the event of general publicity of the matters presented at the preliminary hearing there "might well be a likelihood that a fair and impartial jury might not be obtainable in a trial in Maricopa County or adjacent counties"

falls far short of a showing of a clear and imminent danger of irreparable injury to a defendant through disregard of a claimed constitutional right of such defendant as is required to justify a Federal court in interfering in a routine criminal prosecution in a State court.

IV

The fact that a defendant is a lawyer, a businessman or a minor and evidence adduced at a preliminary hearing might be embarrassing or result in some damage to the reputation of such defendant does not give rise to a presumption that there is a clear and imminent danger of irreparable damage to such defendant such as warrants a Federal court interfering in a routine criminal prosecution in a State court and directing a State Judge or Justice of the Peace as to how such proceeding shall be conducted. This is particularly true when the only showing made discloses that the principal prosecution witness has a criminal record for sex and dope crimes and is unprincipled, since such a showing would only have the effect of destroying her trustworthiness as a witness and as tending to exonerate the defendant.

V

The effect of the claims of plaintiffs in the District Court, simply stated, were

- (a) Rule 27, Rules of Criminal Procedure as amended and Article 2, Section 11, Arizona Constitution, do not restrain a magistrate in his discretion from ordering a closed preliminary hearing in the exercise of his inherent jurisdiction so to do, upon a proper showing of the need therefor;
- (b) Judge Gooding and Justice of the Peace Westfall misinterpreted the Arizona law -- i.e., made a mistake as to the law in making an interlocutory ruling which prejudiced plaintiffs' constitutional rights;
- (c) A federal district judge, in the exercise of the equity powers of a District Court may intervene

from time to time in a State court criminal prosecution and correct such errors as the State court criminal proceeding goes forward.

VI

If the foregoing does not properly analyze plaintiffs' position in the District Court below then it follows, in view of the stout and unequivocal assertions by plaintiffs of the clear violation of their federal constitutional rights by the magistrates in rulings denying a closed hearing, that Rule 27, as amended, and Article 2, Section 11 of the Arizona Constitution as interpreted by the State courts contravenes the United States Constitution and hence are unconstitutional.

If this is the position of the plaintiffs in the District Court then only a three-judge Federal District Court could make that determination and Judge Craig was without jurisdiction to rule in the matter.

VII

Contrary to the stated findings and conclusions in the District Court's Findings and Conclusions, plaintiffs in the District Court had not exhausted their State court remedies.

If, as plaintiffs contend, the magistrates in the State court had inherent power to order a closed preliminary hearing such power must be a discretionary power, to be exercised by the magistrate, if in his discretion irreparable harm may flow to a defendant if an open hearing is held and the public interest dictates that an order closing a preliminary hearing to the public be entered.

The allegation is made that plaintiffs had sought a Writ of Mandamus from the Arizona appellate courts directing the magistrates to order the preliminary hearing closed to the public and that the Arizona appellate courts had declined to entertain the petitions. Hence, it is concluded, plaintiffs had

exhausted their state remedies.

It is elementary law, at least in Arizona, that a Writ of Mandamus may not be employed to control the discretion of an inferior tribunal; neither may it be used in lieu of invoking the appellate procedures to correct an error in an interlocutory order made by an inferior tribunal.

Further, it is elementary law, at least in Arizona, that whether or not a writ issue is discretionary with the tribunal to which application is made. Clearly the Arizona appellate courts may well have concluded that the Petitioners in those courts had not made a showing which justified issuance of a prerogative writ and that the error of the magistrate, if in fact error, could be readily examined and corrected, if found to be prejudicial, by the orderly appeal process.

ARGUMENT - GENERAL

I. The position of appellees (for convenience, unless otherwise indicated, the term appellees will be used to apply generally to plaintiffs in the District Court cases and to both respondents and appellees) can best be described as ambivalent. On the one hand it is argued that the magistrates in the State court have inherent power to order a closed hearing -- a discretionary power so to do if a showing of prejudice is made -- yet hot on the heels of that argument comes the argument, somewhat disguised it is true, but nonetheless it appears to be their argument that the magistrate must close the hearing because of the constitutional rights of plaintiffs.

Appellees have a hard choice. If the argument is that under state law the magistrate has the inherent power to close the hearings but misinterpreted the state law then the

magistrate simply made a mistake, but a mistake as to law in a matter within his jurisdiction.

Do appellees contend that a Federal court may review and nullify under its equity powers interlocutory rulings of a State court in a state criminal prosecution, reviewable on appeal under an orderly state appeal procedure and by injunction nullify or correct any error claimed to involve federal constitutional rights of defendants and asserted to have been made by the State court in interpreting state law?

To state the question is to state the answer.

Appellees must then be driven to the contention that the magistrate must close the hearing to protect the constitutional rights of the plaintiffs below and hence Rule 27, Arizona Rules of Criminal Procedure, as amended, and Article 2, Section 11, of

the Arizona Constitution as construed by Judge Gooding, contravene the Constitution of the United States and hence are void.

What then about the requirements of Section 2281, Title 28, United States Code?

II. The substance of the findings bearing upon the claimed irreparable damage to defendants in the State court proceeding may be stated and disposed of as follows:

(a) There had already been substantial pretrial publicity. (Good or bad?)

Pretrial publicity, unless such as would inflame the community or make public prejudicial matter wholly inadmissible in evidence, has never been thought to be damaging to a defendant's rights to a fair trial. There was no showing of any such publicity which could possibly impair defendants' rights to a fair trial.

(b) Evidence would be produced at the preliminary hearing which very well might not

be admissible at the time of trial.

This is a most puzzling finding by the magistrates adopted by the District judge. Does it amount to a confession of judicial incompetency on the part of the magistrates involved -- a lack of legal knowledge sufficient to enable the presiding magistrate to exclude irrelevant, incompetent or improper evidence?

Does it indicate that defense counsel proposed to turn the preliminary hearing into a discovery device, subpoena all available possible witnesses, state or otherwise, and interrogate them fully as to everything which they might know about the matter even if in the process improper evidence be put in the record ostensibly on behalf of the defendant but to which defendant intended to object at the time of the trial?

In any event there was no showing of any factual evidence to support these most

speculative conclusions.

(c) One defendant in the State court criminal cases was a professional man, one a businessman and one a minor -- hence any publicity in connection with the matters then before the Court would be detrimental to their reputations and affect their livelihoods.

Pure speculation unsupported by proof. In view of the claim there had already been "substantial pretrial publicity" it is indeed difficult to understand in what manner additional publicity would substantially enhance this injury. Certainly the three-ring circus which the State court defendants have conducted gives little support to the notion they did not desire publicity and would be injured by it.

(d) In the event publicity is distributed generally with respect to the evidence submitted at the preliminary hearing the State court defendants might

well suffer irreparable injury; and there
might well be a likelihood that a fair and
impartial jury might not be obtainable at
the trial.

Again sheer conclusive speculations,
wholly lacking in any evidentiary factual
basis.

While the Superior Court magistrate
as to the Hooper and Scroggs case found that
the chief prosecution witness against Hooper
and Scroggs was a most unsavory and unprincipled
person, a convicted prostitute and dope violator
willing to make deals with police officers --
just how this bears upon the case is not
plain -- the District judge apparently did
not rely upon this as supporting the merits
of plaintiffs', Hooper and Scroggs, claims
of injury.

Superficially, at least, it would seem
that these defendants stood to gain quite
appreciably from exposure as to the

unreliability of their chief accuser.

We will now deal briefly with the authorities supporting each specification of error, grouped as seems convenient.

SPECIFICATIONS OF ERROR I, II, V AND VI

I

The District Judge erred in accepting jurisdiction and granting an injunction staying state court action contrary to the restrictions imposed upon such action by Section 2283, Title 28, United States Code for the reason such injunction was not

- (a) expressly authorized by Act of Congress;
- (b) necessary in aid of the District Court's jurisdiction; or
- (c) necessary to protect or effectuate its judgments.

II

The District Judge erred in granting an injunction and staying State court action for the reason there was no showing of clear and imminent irreparable injury sufficient to warrant federal interference with State court action.

V

The District Judge erred in assuming

jurisdiction as to each complaint upon the authority of Section 1983, Title 42, United States Code, for the reasons

- (a) said statute is inapplicable to the State of Arizona, a Superior Court or Justice of the Peace and a County Attorney;
- (b) the ruling of a magistrate refusing to close a preliminary hearing to the public pursuant to such magistrate's interpretation of state statutes does not constitute action by a "person" under color of a statute, ordinance, regulation, custom or usage of a state;
- (c) A Superior Court Judge, Justice of the Peace and County Attorney are not "liable" under Section 1983 to suit at the instance of a "party injured" when acting within their judicial or quasi-judicial authority and jurisdiction.

VI

The District Judge erred in assuming jurisdiction as to each complaint upon the authority of Section 1343, Title 28, United States Code, for the reason that the refusal of each magistrate to construe Rule 27, Arizona Rules of Criminal Procedure, as amended, and the Arizona constitutional provision, Article 2, Section 11, as allowing a magistrate inherent power to order a closed preliminary hearing does not constitute "deprivation, under color of any state law, statute,

ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" nor does it amount to ground for equitable relief under any Act of Congress providing for protection of civil rights.

Section 2283, Title 28, United States Code, provides as follows:

"§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Section 1983, Title 42, United States Code, provides as follows:

"§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress."

Section 1343, Title 28, United States Code, provides in part as follows:

"§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The first question for consideration is whether and under what circumstances a Federal court may issue injunctive process designed to stay State court action.

The original Judiciary Act of 1789 gave no express power to the federal courts to issue writs of injunction. In 1793 these courts

were given the specific power, but a power hedged with restrictions, one of which was

" * * * nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1793, c. 22, § 5.

The restriction, thus enacted, was a significant illustration of the strong apprehension felt by early Congresses of the danger of encroachment by federal courts on state jurisdiction. 43 Harv. Law Rev. 345, 347.

Until about 1870 it appears doubtful if there was any exception to a literal reading of the statute. The statute seriously impaired the federal judicial power, but the courts bowed to the mandate of Congress. 30 Mich. Law Rev. 1145, 1148.

Thereafter, both by judicial construction and by statutory exception, the statute gradually evolved into what today is 28 U.S.C.A., § 2283.

As early as 1849, in the case of Peck v. Jenness, 7 How.612, Mr. Justice

Grier observed that when a State court once took jurisdiction of a case, its right to decide could not be taken away by proceedings in another court. This rule, he said, has its

" * * * foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable for a contempt in one, if they dare proceed in the other."

In 1858, in Taylor v. Carryl, 20 How. 583, Mr. Justice Campbell stated that it was the duty of the court

" * * * to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations * * * [Congress,] in organizing the judicial power of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision."

These were all civil cases. In 1898, in Harkrader v. Wadley, 172 U.S. 148, Mr. Justice Shiras said that the Constitution

" * * * left to the States the right to make and enforce their own criminal laws, * * * and it is the duty of the Supreme Court⁷ to guard the States from any encroachment upon their reserved rights by the General Government or the courts thereof."

After 1890 federal district courts began to enjoin state and county prosecutors under alleged invalid laws. These decisions aroused intense hostility among the states and produced exactly the frictions between the nation and states which it had been the express object of the Act of 1793 to prevent. 43 Harv. Law Rev. 345, 374.

In Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1907), a federal court enjoined the Attorney General of Minnesota from enforcing a state law. When he ignored the injunction he was jailed for contempt. While upholding the contempt sentence, the U. S. Supreme Court used the following language:

"The federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court * * * the right to enjoin an individual, even though a state official,

* * * does not include the power to restrain a court from acting in any case brought before it * * * If an injunction against an individual is disobeyed * * * such disobedience is personal only, and the court * * * can proceed without incurring any penalty * * * The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former."

Justice Harlan, dissenting, wrote:

"This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were 'dependencies' or provinces. It would place the states of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the supreme law of the land."

In Toucey v. New York Life Insurance Co., 314 U.S. 118, 86 L.Ed. 100 (1941), a federal District Court enjoined a man from bringing a suit in a State court to adjudicate a matter

that was res judicata by virtue of a previous federal court decision. In vacating the injunction, Mr. Justice Frankfurter said:

"[The act of 1793] expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court * * * The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly function of a state's judicial process."

The opinion closed by quoting from Justice Campbell's opinion in the case of Taylor v. Carryl, the words that we have quoted above.

In Douglas v. City of Jeanette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943) the court held that federal district courts have authority to decide cases under the Civil Rights Act, but said:

"Want of equity jurisdiction, while not going to the power of the court to decide the cause * * * may nevertheless, in the discretion of the court, be objected to on its own motion * * * Especially should it do so where its powers are invoked to interfere by injunction with threatened

criminal prosecutions in a state court
* * * Congress * * * has adopted the
policy * * * of leaving generally to
the state courts the trial of criminal
cases arising under state laws, subject
to review by this Court of any federal
questions involved. Hence, courts of
equity, in the exercise of their dis-
cretionary policies should conform to
this policy by refusing to interfere
with or embarrass threatened proceedings
in state courts save in those exceptional
cases which call for the interposition of
a court of equity to prevent irreparable
injury. * * * Courts do not ordinarily
restrain criminal prosecutions. No
person is immune from prosecution in
good faith for his alleged criminal acts.
Its imminence, even though alleged to be
in violation of constitutional guarantees,
is not a ground for equitable relief,
since * * * constitutionality * * * may
be determined as readily in the criminal
case as in a suit for an injunction. * * *
Where the threatened prosecution is by
state officers for alleged violations of
a state law, the state courts are the
final arbiters of its meaning, subject
only to review by this court on federal
grounds. * * * Hence the arrest by the
federal courts of the processes of the
criminal law within the states, * * *
are to be supported only on a showing of
danger of irreparable injury 'both great
and immediate' * * * It does not appear
from the record that petitioners have
been threatened with any injury other
than that incidental to every proceeding
brought lawfully and in good faith. * * *"
(Emphasis added)

Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), was a case in which the prosecuting attorney in a State court criminal case proposed to introduce evidence obtained by wiretapping, which action would have been a violation of a federal criminal law. The defendant asked the Federal court for an injunction. Mr. Justice Frankfurter's opinion said:

"Even if the power to grant the relief here sought, may be fairly and constitutionally derived from the generality of the language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the using of their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States. We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American

law. It is impressively reinforced when * * * relations * * * between co-ordinate political authorities are in issue. * * *

* * * * *

"At the worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey Courts. Such a conviction, we have held, would not deprive them of due process of law.

"If these considerations limit federal courts in restraining state prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun. * * *

"If we were to sanction this intervention, we would expose every state criminal prosecution to insupportable disruption. Every question of procedural due process of law - with its far-flung and undefined range - would invite a flanking movement against the system of state courts by resort to the federal forum, with review, if need be, to this court to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court - all would provide ready opportunities which conscientious counsel might be bound to employ to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

Any doubt as to the attitude of the United States Supreme Court in these cases was put to rest by the case of Wilson v. Schnettler, 365 U.S. 381, 5 L.Ed. 2d 620, 81 S.Ct. 682 in which the Court, in an opinion by Justice Whittaker, concurred in by six Justices, further quoted from Stefanelli v. Minard, supra. There the Supreme Court dealt with a case wherein defendants in an Illinois criminal case pending in an Illinois court charged with illegal possession of narcotics brought suit in the federal district court to impound the narcotics claimed to have been illegally seized and to enjoin the state narcotics agents from testifying at the trial of the criminal case in the State court. The narcotics agents moved to dismiss for failure to state a claim and the District Court granted the motion and dismissed the action. The Seventh Circuit affirmed and the Supreme Court granted certiorari to review the matter.

The defendants in the State criminal action had moved to suppress the evidence as illegally seized and the State court, after a hearing, had denied the motion to suppress. The Supreme Court of the United States, in affirming the dismissal of the action, reviewed the matter as follows:

" * * * Indeed, the allegations of the complaint affirmatively show that petitioner does have such a remedy in the Illinois court and that he has actually prosecuted it there, but only to the point of an adverse interlocutory order. That court, whose jurisdiction first attached, retains jurisdiction over this matter to the exclusion of all other courts--certainly to the exclusion of the Federal District Court -- until its duty has been fully performed, *Harkrader v Wadley*, 172 US 148, 164, 43 L ed 399, 404, 19 S Ct 119; *Pack v Jenness* (US) 7 How 612, 624, 625, 12 L ed 841, 846, and it can determine this matter as well as, if not better than, the federal court. If, at the criminal trial, the Illinois court adheres to its interlocutory order on the suppression issue to petitioner's prejudice, he has an appeal to the Supreme Court of that State, and a right if need be to petition for 'review by this Court of any federal questions involved.' *Douglas v Jeanette*, 319 US 157, 163, 87 L ed 1324, 1329, 63 S Ct 877, 882. It is therefore clear that petitioner has a plain and adequate remedy at law in the

criminal case pending against him in the Illinois court.

"There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' *Ponzi v. Fessenden*, 258 US 254, 260, 66 L ed 607, 611, 42 S Ct 309, 22 ALR 879. Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . ' *Douglas v. Jeannette*, supra (319 US at 163).

"By this action, petitioner not only seeks to interfere with and embarrass the state court in his criminal case, but he also seeks completely to thwart its judgment by relitigating in a trial de novo in a federal court the very issue that he has already litigated in the state court. 'If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of

procedural due process of law--with its far-flung and undefined range--would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court [and, we may add, in the ruling of motions to suppress evidence, and in ruling the competency of witnesses and their testimony] -- all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution.' *Stefanelli v. Minard*, 342 US 117, 123, 124, 96 L ed 138, 143, 144, 72 S Ct 118."

If what is here attempted can be sustained, there is no reason why, with this action as a precedent, federal district court review of every ruling of the State court in the course of the trial may not be sought upon the claim that it contravenes some federal constitutional right of the defendant.

Finally, Cleary v. Bolger, 371 U.S. 392, 9 L.Ed. 390, 83 S.Ct. 385, considers and

lays aside the argument that federal courts should interfere to preserve federal constitutional rights on the theory that State court protection is inadequate.

A federal court had enjoined a state official from testifying in a state criminal prosecution and had been affirmed by a divided Court of Appeals.

In reversing Justice Harlan said:

"Courts of equity traditionally have refused, except in rare instances, to enjoin criminal prosecutions. This principle 'is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue.' *Stefanelli v Minard*, 342 US 117, 120, 96 L ed 138, 142, 72 S Ct 118. It has been manifested in numerous decisions of this Court involving a State's enforcement of its criminal law. E.G., *Pugach v Dollinger*, 365 US 458, 5 L ed 2d 678, 81 S Ct 650; *Douglas v Jeannette*, 319 US 157, 87 L ed 1324, 63 S Ct 877, 882; *Watson v Buck*, 313 US 387, 85 L ed 1416, 61 S Ct 962, 136 ALR 1426; *Beal v. Missouri P. R. Corp.* 312 US 45, 85 L ed 577, 61 S Ct 418. The considerations that have prompted denial of federal injunctive relief affecting state prosecutions were epitomized in the *Stefanelli* Case, in which this Court refused to sanction an injunction

against state officials to prevent them from using in a state criminal trial evidence seized by state police in alleged violation of the Fourteenth Amendment:"

[The Court here quoted in part the language of Stefanelli, supra7 and then said:

"The withholding of injunctive relief against this state official does not deprive respondent of the opportunity for federal correction of any denial of federal constitutional rights in the state proceedings. To the extent that such rights have been violated, cf., e.g., Mapp v. Ohio, 376 US 643, 6 L. ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, supra, he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review."

See also:

Dumbrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22

Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424

Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423

Ackerman v. International Longshoreman's Union, 187 F.2d 860 (C.A.9, 1951)

Cooper v. Hutchison, 184 F.2d 119
(C.A. 2, 1950)

Chestnut v. New York, 370 F.2d 1
(C.A. 2, 1966)

We turn now to the District Court's finding and conclusion that the Civil Rights statutes, Section 1343, Title 28 and Section 1983, Title 42, United States Code are or may be construed as an express "authorization by Act of Congress" for a federal court to enjoin State court action.

We first pause to point out that even if the bar of Section 2283, Title 28, United States Code, be lifted by the Civil Rights statutes, it by no means follows that a federal court will automatically enjoin State court action when the asserted federal constitutional rights of a defendant in a State court criminal prosecution are claimed to be infringed. The barrier of the long-standing policy of the federal courts against intermeddling in State court criminal matters must also be breached.

Certainly, while the United States Supreme Court has stepped aside from answering the question directly as to the effect of the Civil Rights Act as an express authorization by an Act of Congress, it has shown no disposition to reach that conclusion despite opportunity to so hold.

In Stefanelli, supra, the Court introduced its consideration of the propriety of an injunctive order involving state action by the phrase

"Even if the power to grant the relief here sought may be fairly and constitutionally derived from the generality of the language of the Civil Rights Act to sustain the claim would disregard the power of Courts of Equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the using of their power."

Probably the most carefully reasoned case denying this effect to the Civil Rights Act is that of Baines v. City of Danville, 337 F.2d 579 (C.A. 4, 1964). The case was decided on rehearing by the Court sitting en banc. The Court expressly turned its attention

to the question as to the effect of the Civil Rights Act upon the equity power of a federal court as limited by Section 2283, Title 28, United States Code, for the District Judge did not reach the merits of the constitutional claims made and the alleged infringement thereof by state officials in the state courts of Virginia. He held Section 2283, supra, and the principles of comity required that he refrain from intermeddling in the Virginia court criminal prosecutions. While it is true there were two dissents the United States Supreme Court denied certiorari.

After considering the historical development of Section 2283 the Court said:

"The anti-injunction statute, as revised in 1948, contains three general exceptions, but it is clear from the Reviser's notes that the only substantive change intended by the enlargement of the exceptions was the overturning of the result in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100. A

majority of the Supreme Court had held in Toucey that the anti-injunction statute prevented federal circumscription of relitigation in a state court of issues already fully litigated in the federal courts. The situation was analogous to a continuation of proceedings in a state court after the action had been effectively removed to a federal court. The purpose of the revision was to conform the two situations. There was also in mind the unseemliness and technical irrationality of concurrent proceedings in rem in state and federal courts, for the court which first seized the res acquired a possession which was necessarily exclusive of that of the other court. It was in recognition of these situations, and in order to overturn the result of Toucey that the 1948 revision introduced the exceptions 'where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'

"The 1948 revision also qualified the literal prohibition of the anti-injunction statute with the words 'except as expressly authorized by Act of Congress.' This replaced the only exception earlier contained within that statute which had been limited to bankruptcy matters. The revisers stated that the change was designed to continue the bankruptcy exception and to recognize those other statutory exceptions which Congress had effectively accomplished without expressly amending the anti-injunction statute and those other exceptions which the Congress might authorize in similar fashion in the future.

"We thus come to the question whether the Civil Rights Act and the Judicial

Code, which confers upon the district courts jurisdiction to grant redress for deprivation by state action of Constitutional rights, constitute an express authorization by the Congress of federal stays of state court proceedings when a claimed denial of civil rights is the basis for invocation of the processes of the federal courts. This question, as such and in this context, the Supreme Court has never considered, though, as will presently appear, it has consistently applied the statute, or the underlying and closely related principles of comity, to foreclose interference by the lower federal courts with state court proceedings involving asserted deprivations of civil rights.

* * * * *

"The anti-injunction statute can have effective application only with respect to those matters over which the district courts have a general equity jurisdiction. If there is no jurisdiction to grant an injunction of any kind, there is no room for the operation of a narrow statutory prohibition of injunctions having a specified effect. If every grant of general equity jurisdiction created an exception to the anti-injunction statute, the statute would be meaningless.

* * * * *

"On the contrary, when the United States is not directly involved as a party and the danger of irritating conflict with state courts is great, the Supreme Court's

disposition has been toward a strict construction of § 2283. This is particularly illustrated by its decision in *Poucey v. New York Life Insurance Co.* It is apparent in its decision of *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 514, 75 S.Ct. 452, 99 L.Ed. 600, in which it said 'b/y' that enactment /The revision which is now § 2283, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation.' In light of that admonition, this inferior court ought not lightly to undertake to relegate § 2283 to meaninglessness.

* * * * *

"Our construction is strongly supported by the Supreme Court's consistent support of the principle of § 2283 in civil rights cases. In every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance. It has usually done so on the basis of considerations of equity and comity fashioned by it, but which are identical with those which underlie the statute. If judicial principles of equity and comity prevent federal stay of criminal proceedings in a state court, it is difficult to see how an unqualified congressional command to the same end can be ignored. If a subsequent act of the Congress is an implied repeal of the absolute congressional direction, it cannot reasonably be said not to have modified a

judicially fashioned rule which, at best, is coextensive with the earlier statute. * * * "

337 F.2d at 588, 589, 590, 591

The Court then relied upon Henderson v. Trailway Bus Company, 194 F.Supp. 423 (1961, D.C. E.D. Va.), a three-judge court. The three-judge court's decision was affirmed by the United States Supreme Court sub. nom. Robinson v. Hunter, 374 U.S. 488, 83 S.Ct. 1874, 10 L.Ed.2d 1044. The case involved prosecution of colored defendants for trespass through a "sit-in." The three-judge court held:

"But if we have erred in not finding infirmity in these statutes or inequality in their enforcement, nevertheless the plaintiffs have not shown an entitlement to an injunction. In the first place, a plain and adequate remedy at law is available to them, and this readiness, of course, completely refutes their appeal to equity jurisdiction. Redress at law is provided in their opportunity to defend the criminal prosecutions, indeed to stand mute until a case is made against them beyond a reasonable doubt under these very statutes, with no burden whatsoever upon them as defendants there. Nothing

here indicates that a full and fair presentation, hearing and consideration of their views upon the validity of the two statutes cannot be had before the State courts in these prosecutions. *Spence v. Cole*, 4 Cir., 1943, 137 F.2d 71, 72. There is also the ultimate right of review in the Federal Supreme Court, as illustrated by *Murdock v. Commonwealth of Pennsylvania*, 1943, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292. Irreparable injury to the plaintiffs through submission of their contentions in this manner to the State tribunals is not demonstrated. This circumstance obviously undermines all foundation for the injunction claimed.

"Strengthening this conclusion is the time-honored, judicious precept that a Federal court should never interpose its decree between a State and a criminally accused save in unusual circumstances--and none is here. *Spence v. Cole*, 4 Cir., 137 F.2d 71, 73, *supra*. So recently as February 27, 1961 the Supreme Court reaffirmed this rule. Aptly speaking to this point for the Court, in *Wilson v. Schnettler*, 365 U.S. 381, 81 S.Ct. 632, 635, 5 L.Ed. 2d 620, Justice Whittaker summarized the doctrine in this language:"

/The Court here quoted the language referred to, *supra*, from *Wilson v. Schnettler*7.

In the interest of bringing this overlong brief to a close, we now merely cite the following cases as bearing upon or

rejecting the applicability of the Civil Rights Act as constituting such an express authorization by Act of Congress:

Outdoor American Corporation v. City of Philadelphia, 333 F.2d 963 (1964, C.A. 3)

Smith v. Village of Lansing, 241 F.2d 856 (C.A. 7)

Goss v. Illinois, 312 F.2d 257 (C.A. 7)

Sexton v. Barry, 233 F.2d 220 (C.A.6)

DeLoach v. Rogers, 268 F.2d 928 (C.A. 5)

Egan v. Aurora, 275 F.2d 377 (C.A. 7)

Reid v. City of Norfolk, 179 F.Supp. 768 (D.C. E.D. Va. 1959)

Fowler v. United States, State of California and its Officials, 258 F.Supp. 638 (D.C. C.D. 1966)

Hewitt v. City of Jacksonville, 188 F.2d 423 (C.A. 5, 1951)

Even in cases which have construed the Civil Rights Act as providing such express authorization the ruling has been that jurisdiction to supervise state action will only be exercised in exceptional cases meeting the clear and imminent danger of irreparable damage test.

Sarisohn v. Appellate Division
2nd Dept., Supreme Court of N.Y.
265 F.Supp. 455 (1967)

Wallach v. City of Pagedale, 376
F.2d 671 (C.A. 8, 1967)

United Steel Workers v. Bagwell, 239
F.Supp. 626 (D.C. W.D. No. Car. 1965)

Sires v. Cole, 320 F.2d 877 (C.A. 9,
1963)

Stift v. Lynch, 267 F.2d 237 (C.A. 7,
1959)

(Cf. Douglas v. City of Jeannette, supra)

SPECIFICATIONS OF ERROR III AND IV

III

The District Judge erred in granting an injunction staying State court action for the reason the plaintiffs (defendants in the State court) had an adequate remedy for relief, if justified, and had not exhausted their state remedies, i.e., by Motions to Quash the Information addressed to the trial court and by appeal to the state appellate courts if necessary. Further, a Writ of Mandamus does not lie to control discretion of an inferior tribunal or to review error in interlocutory orders within the jurisdiction of the inferior tribunal.

IV

The District Judge erred in granting an injunction staying State court action for the reason that the complaints affirmatively

showed on their face that substantially the same relief had been sought by plaintiffs in both the Arizona Court of Appeals and the Arizona Supreme Court and had been refused plaintiffs by the Arizona appellate courts. This constituted a State court interpretation of Arizona law that either the magistrate had no inherent power to close a hearing because of Article 2, Section 11 of the Arizona Constitution or that there was no sufficient showing of clear, imminent and irreparable injury to plaintiffs such as warranted denying the public the right and liberty of observing the court processes of the Arizona Courts as guaranteed by both the United States and the Arizona Constitutions. In either event, the error of the Arizona Courts, if in fact error was committed, is not subject to review by a United States District Court under its equity powers.

Article 2, Section 11, Arizona State Constitution provides:

"§ 11. Administration of justice

Section 11. Justice in all cases shall be administered openly, and without unnecessary delay."

This provision clearly states the public policy of Arizona that the business of its Courts shall be transacted in full public view. It is an addition to and supplements Article 2, Sections 23 and 24 of the Arizona Constitution which guarantee

a trial by jury, and in criminal cases a public jury trial.

It seems clear, therefore, that when the Arizona Supreme Court rejected the Petition for a Writ of Mandamus it well may have done so by reason of the above constitutional provision.

However, appellees defeat their own case when, after establishing that the magistrate's power must be inherent and hence discretionary, they then assert that they have exhausted their state court remedies through Petitions for a Writ of Mandamus.

A Writ of Mandamus is not allowable under Arizona law to control or supervise the exercise by an inferior tribunal of a discretionary power. In Greater Arizona Savings and Loan Assoc. v. Tang, 97 Ariz. 325, 400 P.2d 121, the Arizona Supreme Court said:

"Mandamus will issue to compel public officers, including judges of inferior courts, to perform an act which the law specifically enjoins as a duty * * *
However, if the act sought for be judicial

in its character, this court cannot command what its action should be, much less can command how and what said action should be after the matter has been acted upon, no matter how erroneous. * * * It is fundamental that where, as here, the lower court has jurisdiction of the matter it has the power to determine and decide the matter, which includes the power to decide it wrong as well as decide it right."

See also In Re American Employers Ins. Co.,
91 F.2d 731 (5th Cir. 1937)

Mandamus, of course, is the same as an injunction. There is no difference between enjoining a judge from holding closed hearings by Writ of Mandamus and directing that the judge hold open hearings.

If, after the preliminary hearing is closed, true prejudice has in fact been established, the defendant in a criminal case may move to quash the Information. While Rule 169, Arizona Rules of Criminal Procedure, does not explicitly make reference to such reason for a Motion to Quash, plainly if an illegal preliminary hearing has been

held there has been no lawful preliminary hearing and hence the defendant may move to quash.

Nor is the defendant without a remedy if denied a closed hearing. In People v. Elliott, 354 P.2d 225 the California Supreme Court held that improper refusal of a closed preliminary hearing survived as grounds for reversal of a criminal conviction. While there a statute authorizing such a demand by a defendant was involved the improper denial of such a request, if the Court had the power to grant it, would seem equally open to appellate scrutiny.

Finally, all claims of prejudice are foreclosed appellees by the case of United States v. Handy, 351 U.S. 454, 76 S.Ct. 965, 100 L.Ed. 1331. The Court said:

" * * * While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside,

and that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams v. United States*, 317 US 269, 281, 87 L ed 268, 276, 63 S Ct 236, 143 ALR 435. See also, *Buchalter v. New York*, 319 US 427, 431, 87 L ed 1492, 1496, 63 S Ct 1129; *Stroble v. California*, 343 US 181, 198, 96 L ed 872, 885, 72 S Ct 599. Justice Holmes, speaking for a unanimous Court in *Holt v. United States*, 218 US 245, 251, 54 L ed 1021, 1029, 31 S Ct 2, 20 Ann Cas 1138, cautioned that 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.'

"We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced. The law recognizes that prejudice may infect any trial and provides protection against. For example, provision is made for the voir dire examination and for challenges of jurors who indicate that they may be prejudiced. In addition, a substantial number of peremptory challenges is allowed. This gives to each party a large discretion to exclude jurors deemed objectionable for any reason or no reason. Another protection is available through the severance of the trials of the defendants and through continuances of the respective trials.

Still another means of protection is that of a change of venue for proper cause.

"In the instant case, notwithstanding the fact that competent counsel for petitioner did not use all of his peremptory challenges after a searching examination of prospective jurors on voir dire, and did not seek a continuance of the trial or a change of venue, petitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. * * *

100 L.Ed. at 1338

No reasons, other than by way of speculative conclusions, have been shown to warrant federal intervention and intermeddling in orderly State court criminal processes.

SPECIFICATION OF ERROR VII

The District Judge erred in finding (p. 1, lines 21-29, Findings of Fact, Conclusions of Law and Order) that "both counsel (counsel for Ron Kent Hooper and Purvis Ole Scroggs and for State of Arizona and Robert Corbin, as County Attorney) concurred that

if * * Honorable William H. Gooding * * had inherent power to exclude the public * * the cause referred to was an appropriate cause for the Court to exercise its discretion in favor of a closed hearing" for the reason that there is no evidence in the record to support such a finding.

A reading of the transcript discloses that the Court's choice of words goes beyond what the County Attorney said. His remarks were directed to the factual assertions made by defense counsel.

This specification is made simply to avoid apparent agreement with the plaintiffs' position.

CONCLUSION

The interlocutory order in Hooper and Scroggs should be vacated with directions to dismiss the complaint.


The temporary order in Borquez should be vacated and a Writ of Prohibition issued directing the District Judge to desist from further entertaining the complaint

for injunctive relief.

Respectfully submitted,

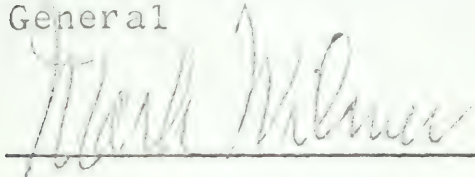
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in cursive script, appearing to read "Mark Wilson", is written over a horizontal line.

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In the

United States Court of Appeals

For the Ninth Circuit

HONORABLE WILLIAM H. GOODING, Judge of
the Superior Court of the State of Ari-
zona, and ROBERT K. CORBIN, County
Attorney of Maricopa County, Arizona,
Appellants,

vs.

RON KENT HOOPER and PURVIS OLE
SCROGGS,
Appellees.

STATE OF ARIZONA EX REL. ROBERT K.
CORBIN,

vs.

UNITED STATES DISTRICT COURT and HON-
ORABLE WALTER E. CRAIG.

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No. 22669

In the

United States Court of Appeals

For the Ninth Circuit

HONORABLE WILLIAM H. GOODING, Judge of
the Superior Court of the State of Ari-
zona, and ROBERT K. CORBIN, County
Attorney of Maricopa County, Arizona,
Appellants,

vs.

RON KENT HOOPER and PURVIS OLE
SCROGGS,

Appellees.

STATE OF ARIZONA EX REL. ROBERT K.
CORBIN,

vs.

UNITED STATES DISTRICT COURT and HON-
ORABLE WALTER E. CRAIG.

Brief of Appellees

JURISDICTION

This is an action for an injunction filed on February 26, 1968. An answer was filed on March 7, 1968. A temporary restraining order was issued, followed by a preliminary injunction, both by Judge Walter Craig. Findings of fact, conclusions of law, and a preliminary injunction were reduced to writing on March 19, 1968, (appended to this brief as Appendix A) and appeal immediately followed.

The jurisdiction of the trial court is the subject of discussion in the brief following. The matter came on before this Court after the date of the oral preliminary injunction, but before the final written order; appellants applied to this Court for a writ of prohibition or mandamus, and made an application for a restraining order. On March 12, this Court declined to enter a restraining order but docketed the matter to be considered both as an application for an extraordinary writ and as an appeal on the merits from an interlocutory injunction. Incontrovertibly, this Court has jurisdiction of the appeal under 28 U.S.C. § 1292; for reasons to be developed in the brief following, it does not have jurisdiction for a special writ. Other jurisdictional problems are considered in the brief following.

STATEMENT OF THE CASE

Because of the unusual expedition of this case, we do not have a paged record to which references can be made. However, the matter was comprehensively summarized in the findings of fact and conclusions of law of the trial court. The factual matters are wholly uncontroverted, being taken from the record as made before the trial court on which the defendants offered no factual opposition. We therefore append the findings, conclusions and judgment here, with this brief, and summarize the matter in this Statement by reference to those findings and to the trial court record.

The appellee Hooper is a young attorney, practicing in Phoenix, Arizona. Scroggs is a bail bondsman, also of Phoenix. Hooper and Scroggs were charged with having committed certain crimes involving stolen property under the laws of the State of Arizona. In the Arizona practice, determination of probable cause may be made either by a grand jury or by a magistrate, and under the latter practice, a Superior Court Judge may sit as a magistrate. In the

instant case, that is what happened—the Honorable William H. Gooding, a Judge of the Superior Court, did sit as a magistrate to determine in a preliminary hearing whether there was probable cause to bind Hooper and Scroggs over for trial.

As this preliminary hearing was at its earliest stage, the appellees moved “for an order excluding all persons, except witnesses when testifying” from the preliminary hearing. This motion was based on the court’s claimed inherent power to control judicial proceedings. Before this motion came on, some hours of oral testimony had been taken on other motions, and in addition, various exhibits were tendered. The principal witness for the prosecution had earlier testified that she had been convicted on numerous occasions for sexual and drug offenses. She also had testified that she had made bargains with law enforcement authorities to dismiss nearly thirty charges pending in Arizona against her and her husband. Other testimony earlier heard by the court included her extremely derogatory remarks about Hooper’s legal abilities.

The State trial court, after considering the entire record, concluded in substance that there had been substantial pre-trial publicity as to matters pending before the court; that there would be evidence produced at the preliminary hearing which might very well not be admissible at the time of trial if there were to be a trial; and that there was a substantial likelihood of interference with the plaintiffs’ right to a fair trial by an impartial jury by pretrial publicity. The court also concluded that an open hearing would be destructive of the professional and business reputations of the appellees.

In these circumstances, the prosecution objected to the closing on one ground only, and this was that, as stated by the County Attorney in the court below, “The Superior

Court does not have discretionary power to close a preliminary hearing." This result was supposed to follow from a recent amendment to Rule 27 of the State Rules of Criminal Procedures of the Supreme Court of Arizona. Prior to its amendment, Rule 27 had read as follows:

"During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined. The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court."

On January 29, 1968, the Supreme Court of Arizona had eliminated the last sentence, which, on its face at least, would appear to take from defendants a privilege which they previously had to have hearings closed. The prosecution contended that somehow this elimination of the right of the defendant also deprived the trial court of any discretion to close the proceedings, and this same position was taken on the record in the court below.

This view was adopted by the State trial judge. He held that by virtue of the amendment—not by its language, but by the circumstances of its adoption—he was deprived of the ability to close a courtroom for a preliminary hearing for any purpose.

The precise issue thus presented was whether a Superior Court Judge, sitting as a magistrate, did have discretion in any circumstances to determine whether preliminary hearings should be open or closed. An application for a writ of mandamus, which carefully did not attempt to direct how the discretion of the trial judge should be exercised, but

merely to require him to exercise his discretion in some manner, was filed with the Court of Appeals of the State of Arizona. That Court declined to consider the matter with the suggestion that it be presented instead to the State Supreme Court. Application was thereupon made to the State Supreme Court which declined without comment to enter the writ of mandamus. There is no other remedy available to the plaintiffs in this case under State practice.

In these circumstances, the plaintiffs applied to the Federal District Court for an injunction not against the holding of the hearings, but to restrain the Judge and the County Attorney from proceeding with hearings without the Judge exercising normal judicial discretion to determine whether the hearings should be open or not.*

The District Court found that in the absence of consideration by the State trial court as to whether the preliminary hearing should be conducted in a closed manner, there was a reasonable likelihood that prejudicial news prior to trial would prevent a fair trial. The court also concluded that if the hearings were opened without exercise of discretion by the magistrate, and if he should later conclude that there was no reasonable cause to hold the plaintiffs for trial, then publication of the proceedings injurious to the reputations of the plaintiffs might well be an invasion of their privacy. The court found that there might well be irreparable injury to the appellees.

The District Court was understandably puzzled as to just what it was in State law or practice which might be supposed to deprive judges of their normal discretion. Certainly nothing in Rule 27 says this. He therefore enjoined continuation of the open preliminary hearing, thus permitting the hearing to go on in a closed fashion, but at the same

*As the oral transcript, but not the pleadings show, Judge Gooding admitted the essential elements of the complaint.

time broadly suggested to the prosecutor that he take the matter to a higher court in Arizona to determine what discretion, if any, State trial judges did have in these circumstances.

This appeal, along with applications for special writs, followed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 27 of the Rules of Criminal Procedure is set forth in the Statement of the Case immediately preceding.

QUESTIONS PRESENTED

1. Can a state constitutionally require that all preliminary hearings in criminal cases, regardless of circumstances, be open to the public and the press? The subsidiary issues are fair trial, equal protection, and right to privacy.

2. Is there federal jurisdiction to enjoin state criminal proceedings in which the state trial judge is barred by state law from exercising his discretion as to whether preliminary hearings should be open or closed?

SUMMARY OF ARGUMENT

The State trial court has held that under the law of Arizona, it has no discretion whatsoever to close a preliminary hearing. That court has found as a fact that conducting an open preliminary hearing is likely to make a fair trial impossible and that there will be great injury to the reputations of the defendants which may be wholly unjustified, but he has nonetheless found that there is nothing he can do about it. The State Supreme Court has declined to disabuse him of this belief, and there is therefore no way whatsoever of preventing a severe denial of the constitutional rights of appellees except by a federal court order.

In these circumstances, the Federal Court has enjoined the State court from proceeding with an open court preliminary hearing until the State Supreme Court can have an effective opportunity to determine whether this unlikely practice really is required by the law of Arizona. The Federal District Court has in nowise interfered with the holding of the preliminary hearing, but it has required that it be closed until the State Supreme Court can speak.

The Federal Court has jurisdiction for this purpose under 28 U.S.C. § 1343, taken in conjunction with 42 U.S.C. § 1983.

This is not a three-judge court case under 28 U.S.C. § 2281, and the trial court was not barred of jurisdiction by 28 U.S.C. § 2283; this is within the jurisdiction because of the irreparable injury, *Dombrowski v. Pfister*, 380 U.S. 479, 483-86, 85 S. Ct. 116, 14 L. Ed. 2d 22 (1965). The so-called "abstention doctrine" does not bar jurisdiction, *Zwickler v. Koota*, U.S., 88 S. Ct. 391, L. Ed. 2d (1967), Dec. 5, 1967.

The matter is here on appeal and also on a group of applications for special writs. This Court does have jurisdiction of the appeal under 28 U.S.C. § 1292; it does not have jurisdiction as to the special writs, which should be dismissed.

On the merits, the State trial court and the Federal District Court have both found every fact which would make a denial of due process under *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). It would be impossible to find a clearer case. In addition, Arizona conducts its preliminary hearings either by grand jury (which is always closed) or by magistrate's hearing which under this local interpretation is always open. This is a denial of equal protection dependent absolutely upon

the arbitrary exertion of power. Moreover, to permit what may be gross slander throughout the community, with no recourse and with no probable cause, is a constitutional invasion of the right of privacy. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

The remedy devised by the Federal District Court of permitting the State criminal proceedings to go forward on a closed basis until the State Supreme Court can speak as to the local law is a wise adjustment of the competing state and federal interests.

ARGUMENT

I. Introduction.

Before we go far into this case, we shall necessarily be bogged down in a maze of technicalities of jurisdiction and procedure. But the path must be taken with an eye to the shining light at the end of the trail: the ultimate issue is whether a person charged with crime, as to which there is not yet established probable cause to believe he committed, must in all circumstances be exposed to an open hearing. The issue is whether judges, when they are judging, have any discretion in any case to close hearings to the public. Seldom does an issue so transcend its facts. Inescapably, in deciding the case of the attorney, and the prostitute, and the fur coat, we are also deciding whether the five year old child victim of a sex crime *must* be exposed for the world to see.

It was an odd coincidence that almost to the day that this matter was presented in the State trial court, the American Bar Association House of Delegates was adopting the Reardon Report with an amendment to Section 3.1 on pre-trial hearings. Section 3.1 had previously provided that at any preliminary hearing, a defendant should be permitted

to move that the hearing be closed “on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference.” The amendment provided that this should expressly include “representatives of the news media” among those who might be excluded.

The decision of the State trial judge makes compliance with the standards of the Reardon Report impossible in Arizona. But we need not consider the extent to which the Reardon requirements are identical with the requirements of the Constitution of the United States. We have here three express violations of the Federal Constitution by the failure of the trial judge to exercise discretion as to whether the hearing may be closed:

1. There is a deprivation of the right to fair trial in a fair tribunal, expressly held to be a basic requirement of due process in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

2. There is a denial of equal protection of the laws by the difference in treatment between persons charged before a grand jury and persons charged before a preliminary hearing.

3. There is an invasion of the right of privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

To these grave matters we turn.

II. Jurisdiction in the District Court and Here.

A. JURISDICTION IN THE DISTRICT COURT.

1. The district court had jurisdiction under the Civil Rights Act.

28 U.S.C. § 1343, authorizes the federal district courts to hear issues and proceedings such as are presented here.

“The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.”

The instant complaint for an injunction falls squarely within paragraphs (3) and (4) as set forth above because the plaintiffs are about to be irrevocably injured as to a “right, privilege or immunity secured by the Constitution of the United States”; the defendant has expressly found this to be true. Furthermore, 42 U.S.C. § 1983, permits a “proper proceeding for redress” to any person about to be deprived under state law of privileges or immunities guaranteed by the United States Constitution. § 1983 reads in full as follows:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Several recent decisions from the various Courts of Appeals affirm that the district courts do have jurisdiction under a complaint alleging injuries and consequences such as are alleged here. At the very minimum, the plaintiffs are entitled to a hearing on the legal issues presented. *Urbano v. Calissi*, 353 F.2d 196 (3d Cir. 1965); *Birnbaum v. Trussell*, 347 F.2d 86 (2d Cir. 1965); *Joe Louis Milk Co. v. Hershey*, 243 F. Supp. 351 (D.C. Ill. 1965); *Harmon v. Superior Court*, 307 F.2d 796 (9th Cir. 1962); *Armstrong v. Rushing*, 352 F.2d 836 (9th Cir. 1965).

In the *Urbano* case, *supra*, the plaintiff alleged under 28 U.S.C. § 1343, and 42 U.S.C. § 1983, that various New Jersey State officials, acting under color of State law, were violating his rights. The district court after reading the complaint dismissed on the grounds that it failed to disclose any basis for jurisdiction. On appeal the decision was reversed, the Third Circuit observing:

“Plaintiff was entitled to an opportunity to be heard on the legal questions involved in the court’s conclusion that the complaint should be dismissed. See *Harmon v. Superior Court*, 307 F.2d 796 (9 Cir. 1962). The defendants have appropriate means under the Rules of Civil Procedure to move for the dismissal of the action or for summary judgment. At that time both sides will have full opportunity to present their contentions and whatever conclusion the District Judge may arrive at on the merits . . . will have the benefit of the views of the contending parties on the merits and on the jurisdictional question.” (353 F.2d at 197).

In *Harmon v. Superior Court*, 307 F.2d 796 (9th Cir. 1962), this Court held that a district court’s dismissal of a complaint, on its own motion, without giving the plaintiff an opportunity to be heard was “plain error.” The *Harmon* case has direct applicability to this proceeding since Har-

mon alleged in *pro per* that the "Superior Court of California and judges of that court and of the District Court of Appeal of California, who decided a case against appellant, the District Attorney of Los Angeles" and various other state officials deprived him of his constitutional rights as guaranteed him by the United States Constitution. The district court's dismissal of the action for lack of jurisdiction was summarily reversed.

"Appellant has attempted, however imperfectly, to state a claim under acts of Congress that expressly give the District Court jurisdiction. That court then had jurisdiction. (Addisson, *supra*; see also Russell v. United States, 9 Cir., 1962, 306 F.2d 402).

"The claim may be, as appellees assert, entirely spurious. The complaint may well not state a claim upon which relief can be granted. It may be that appellant cannot amend to state such a claim. But those are not the questions before us. The court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot. As is stated in *Bell v. Hood*, 1946, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939 (quoted in *Addisson*, *supra*) '* * * it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.'" (307 F.2d at 798).

We submit that the facts as alleged in the instant complaint, particularly in view of the defendant's own findings of constitutional violations in the event of an open preliminary hearing, make this a far stronger case than that pre-

sented by *Harmon* and, manifestly, entitled to this Court's consideration upon a full hearing. In *Armstrong v. Rushing*, 352 F.2d 836 (9th Cir. 1965), also an action under the Civil Rights Act, the court again reversed a summary dismissal of a complaint and asserted that a plaintiff must be given the right to properly present his contentions. See also *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

2. The three-judge rule is inapplicable.

28 U.S.C. § 2281 requires that injunction cases come on before three judges in any action "restraining the enforcement, operation or execution of any State statute by restraining the action of any officer" of a State in the enforcement or execution of the statute.

No statute at all is involved in this case. The term is broad enough to cover a variety of types of enactments, *American Federation of Labor v. Watson*, 327 U.S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946); but the provision has no application where a valid statute or order is being executed in a manner prejudicial to constitutional rights, *Benoit v. Gardner*, 351 F.2d 846 (1st Cir. 1965). A three-judge court is not required where plaintiffs do not question the constitutional validity of any statute of a State, *Sherwood v. Bradford*, 246 F. Supp. 550 (S.D. Cal. 1965). The order of Judge Gooding is not an interpretation of a State statute or order of general application representing considered State policy; if this is State policy at all, which we doubt, it is unconsidered.

3. The district court is not barred of jurisdiction by 28 U.S.C. § 2283.

28 U.S.C. § 2283 expressly provides that a "court of the United States may not grant an injunction to stay proceedings in a State court" with certain exceptions. In the instant

case, the District Court does not stay proceedings in a State court, it merely conditions its manner. The injunction does control a phase of the operation of the State court by conditioning its right to proceed upon the closing of its doors and the emptying of its courtroom of spectators.

We shall not go into the refinements of what it is that "stays" a proceeding, because it has been overwhelmingly established that § 2283 does not bar an injunction where there is irreparable injury to constitutional rights, *Dom-browski v. Pfister*, 380 U.S. 479, 483-86, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965). The strongest of cases against federal interference in state criminal proceedings also affirms that there may be federal jurisdiction in the case of irreparable injury; *Stefanelli v. Minard*, 342 U.S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951). When there is genuine and irretrievable damage, federal courts will afford equitable relief even though the result is to forbid criminal prosecutions or other legal proceedings in State courts, *Denton v. City of Carroll-ton*, 235 F.2d 481 (5th Cir. 1956); and as to the standards of irreparable injury, see *Stevens v. Frick*, 372 F.2d 378 (2d Cir. 1967), *cert. denied*, 387 U.S. 920, 87 S. Ct. 2034, 18 L. Ed. 2d 973 (1967).

If the appellees had any effective remedy in the State court, even by appeal after conviction, appellants could at least argue that there was no jurisdiction in the federal court, though such a contention would be marginal in a case of so extreme a violation of constitutional rights as this. But in the instant case, we have express findings as to irreparable injury. We have a finding that the appellees may not get a fair trial in the State court, should probable cause be found, unless the proceedings are closed. We also have an express finding of invasion of privacy, as to which there could be no remedy after the event.

In these circumstances the District Court had jurisdiction despite § 2283.

4. The "abstention doctrine" did not preclude the exercise of jurisdiction by the district court.

Apart from § 2283, it appears to be contended that somehow, in the general theory of federal-state relations, the trial court was barred from taking jurisdiction by the so-called "abstention doctrine."

We shall not elaborate the argument in the negative because we think it is concluded by the recent decision of *Zwickler v. Koota*, U.S., 88 S. Ct. 381, L. Ed. (1967), Dec. 5, 1967. This case specifically holds that a federal district court has no discretion to abstain from deciding the merits of a suitor's claim that a New York statute covering the distribution of political handbills was overly broad. The prayer for a declaratory judgment was coupled with a request for injunctive relief enjoining *future* criminal prosecutions under the challenged State statute. A three-judge court, applying the doctrine of abstention, dismissed the case remitting the plaintiff to the New York courts; the United States Supreme Court in an extensive opinion, reversed without dissent. The case was reviewed because it presented "an important question of the scope of the discretion of the district courts to abstain from deciding the merits of a challenge that a state statute on its face violates the Federal Constitution." In the instant case there is not only an allegation as to violation of several provisions of the Federal Constitution, but, additionally, a finding that these violations will occur unless the defendant exercises his discretion.

In *Zwickler, supra*, the Supreme Court first noted that the Civil Rights Act of 1871, which we invoke in this case, and similar acts expressly gave federal courts a vast range of

power that had lain dormant since 1789. In thus expanding the federal court's power, "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." The district courts could not escape, in the Court's view, this responsibility simply because State courts also have the responsibility of deciding federal claims. Furthermore, the judge-made doctrine of abstention, promulgated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), sanctions escape from the federal court's duty to decide constitutional issues "only in narrowly limited 'special circumstances'." A recognized special circumstance, relied on by the lower court in *Zwickler* is when the State court may so construe the statute as to avoid or modify the constitutional question. The Supreme Court found no such easy out in *Zwickler* nor is one present here: the defendant and by inaction the State courts have so construed the Arizona practice as to interfere with appellees' federal rights.

The Supreme Court next considered whether the plaintiffs' request for injunctive relief as to *future* state criminal prosecutions constituted a "special circumstance" warranting exercise of the abstention doctrine. The Court held that inclusion of a prayer for injunctive relief did not justify use of the abstention doctrine. In fact, the Court expressly recognized that certain situations—which we submit the instant case presents—may require the exercise of the district court's injunctive powers pending consideration of the constitutional claims. Unless such injunctive relief issues in this case, the plaintiffs' rights or at least a substantial portion of them will be irreparable destroyed.

B. THIS COURT HAS JURISDICTION OF THE APPEAL MATTER ONLY.

The Hooper-Gooding matter was originally brought here on an application for special writ of prohibition or mandamus, with jurisdiction sought under 28 U.S.C. § 1651. While this Court permitted the petitions to be filed, it declined to give a stay and, presumably in the light of our objections to the use of the special writs, directed that the matter be presented also as an appeal. The order of the District Court was readily appealable under 28 U.S.C. § 1292. The record could be and has been swiftly brought here on appeal, and it is essential to any fair understanding of the matter. The writs are not to be used as a substitute for appeal, even though hardship may result from delay, *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1965); the writs are reserved for extraordinary cases where appeal is clearly inadequate, *Ex parte Fahey*, 332 U.S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947). Certainly, then, the writs should not be used where appeal is readily available and there is no hint of hardship.

This is particularly true on jurisdictional matters which the lower court is competent to decide and which are reviewable in regular course, *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). The writs will be used only where appellate review would be defeated if the writs were not used, because they issue only in aid of the appellate court's jurisdiction, *CMAX, Inc. v. Hall*, 290 F.2d 736 (9th Cir. 1961).

We suggest that the applications for the writs be dismissed and that the matter be disposed of on the appeal.

We direct the attention of the Court to the existence of a second case, referred to in a few words in paragraph IV. D. of the petition for the special writs in our own case. This matter refers to "another similar petition to the United States District Court for the District of Arizona" in what

is referred to as the *Borquez* case. According to the allegation, a restraining order was issued in that case which had not yet been heard on application for preliminary injunction.

Undersigned counsel do not know, except in the most general sense, what the *Borquez* case is. Presumably, whatever it is will be disposed of by the court below in the light of the opinion of this Court in the Gooding appeal. There is no suggestion in the moving papers of any reason at all as to why an extraordinary writ should be used to preclude the district court from considering an application for a preliminary injunction, particularly where his order on the preliminary injunction would be appealable when entered. Without holding a representation in the matter, therefore, we content ourselves with suggesting that this Court has no proper jurisdiction in the second matter at this stage and that the petition for extraordinary writ in respect to it should be dismissed.

III. The Action of the State Trial Court Denies Appellees the Right to a Fair Trial.

The State trial judge has ruled that he has no discretion to close the preliminary hearing even if the failure will interfere with the defendants' rights to a fair trial by an impartial jury. Our position is simple: the Constitution, and specifically the Sixth Amendment and the Fourteenth Amendment, requires that a presiding magistrate have the discretion to close a preliminary hearing if there is a reasonable likelihood that the failure to close the hearing will interfere with the defendant's right to a fair trial. Any other result, we submit, would force the conclusion that a trial judge may not take appropriate measures to protect a criminal defendant's right to a fair trial.

The Supreme Court of the United States has held that “a fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955); *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948). In *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), the Court overturned the conviction because the trial judge had failed to protect the defendant’s right to a fair trial from prejudicial publicity. The Court noted that one-sided prejudicial news comment on pending trials “has become increasingly prevalent” and ruled that the responsibility for taking corrective measures lies primarily with the nation’s trial judges:

“Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.*” (Emphasis supplied) 384 U.S. at 362, 86 S. Ct. at 1522.

The *Sheppard* Court suggested several judicial remedies where there was a “reasonable likelihood” that prejudicial pre-trial publicity would interfere with a fair trial, including change of venue, continuance, and granting of a new trial if the publicity arose during the course of the proceedings. Significantly, the Supreme Court did not limit the judge’s resources to the enumerated remedies: the courts must take “such steps by rule and regulation that will protect their processes from prejudicial outside interferences.” 384 U.S. at 363, 86 S. Ct. at 1522.

Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), also emphasizes the necessity of nipping pre-trial publicity in the bud. The reversal of the conviction was

based in part on extensive television coverage during the trial, but the court also weighed publicity of a pre-trial motion:

“It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage and to postpone the trial, they are unquestionably relevant to the issue before us.” 381 U.S. at 536, 85 S. Ct. at 1629.

Chief Justice Warren also emphasized in his concurring opinion that detrimental publicity must be curtailed at the pretrial stage:

“The parties to this case, and those who filed briefs as *amici curiae*, recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in *White v. State of Maryland*, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193, and *Hamilton v. State of Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, clearly hold that *an accused is entitled to procedural protections at pretrial hearings as well as at actual trial* and his conviction will be reversed if he is not accorded these protections. In addition, in *Pointer v. State of Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, we held that a pretrial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial.” 381 U.S. at 567, 85 S. Ct. at 1645 (Emphasis added) (concurring opinion).

The precise action which is urged here has been recommended in American Bar Association Project on Minimum Standards of Criminal Justice, *Fair Trial and Free Press*, Sec. 3.1, p. 7 (Rev. Tentative Draft, July, 1967):

“In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing “may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference.”

Several leading cases have underscored the need for the exercise of such discretion. In *People v. Elliott*, 354 P.2d 225, 54 Cal. 2d 498, 6 Cal. Rptr. 753 (1960), the court interpreted a statute identical to the former Arizona statute and indicated that the power to close preliminary hearings has constitutional overtones:

“This is not a mere insubstantial right. It is, rather, a fundamental safeguard. The testimony heard at the preliminary examination is often that of the prosecution only. The defense may remain silent if it appears that reasonable or probable cause to commit has been established. One of the main purposes of section 868 [the mandatory exclusion provision] is to give the defendant the opportunity of protecting his rights to an impartial and unbiased jury by preventing dissemination of testimony, either by newspaper or other media prior to trial. See *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163. ‘The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.’ *Lombardi v. California St. Ry. Co.*, 124 Cal. 311, 317, 57 P. 66, 68. This right may be substantially impaired if the protection afforded by section 868 is denied.” 354 P.2d at 229.

The same conclusion has been reached in New York, where the court extended the provision relating to preliminary hearings to a hearing on a motion to suppress alleged confessions, although no rule directly pertained to such hearings:

“Because of the posture of any case following a Huntley hearing, the publication of testimony adduced thereon or the conclusions reached by the judge thereafter, where the defendant requests exclusion of the public, would create a reasonable probability of prejudice; and as the courts said in *People v. Marturano*, 24 A.D. 2d 733, 263, N.Y. S.2d 469, the procedure adopted here along with the attendant wide publicity ‘may well have prejudiced defendant’s right to a fair trial in the county of venue.’” *People v. Pratt*, 27 A.D.2d 199, 278 N.Y.S.2d 89, 93 (1967).

Five states consider the closing of preliminary hearing doors to be so significant that the judge is directed—without discretion on his part—to exclude all persons except parties upon the motion of the defendant. See, Cal. Pen. Code § 868 (1959); Idaho Code Ann. § 19-811 (1948); Mont. Rev. Codes Ann. § 94-6110 (1947); Nev. Rev. Stat. § 171.445 (1959); Utah Code Ann. § 77-15-13 (1953).^{*} See also, England’s newly-adopted Criminal Justice Act of 1967, Sec. 3.

Similar orders such as are requested here have been entered in states where no relevant statutes exist. Similarly,

^{*}Arizona, of course, has eliminated the provision for mandatory exclusion and now has no relevant provision. See, Rule 27, Ariz. R. Crim. P., as amended:

“During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined.”

at least one Nevada court has excluded the press during a motion to suppress, even though Nevada has no statute directly in point.† Indeed, the Rearden Report specifically so indicates:

“Even in jurisdictions not having such provisions [for mandatory exclusion], a number of judges responding to the Committee’s questionnaire indicated that they have had occasion to exclude the public from a pretrial hearing, or from a hearing held during trial outside the presence of the jury; others state that they have frequently gone into chambers on particular matters or held side-bar conferences out of the hearing of those present in the courtroom. In addition, several instances of closed hearings were reported in the press during the period of this study and called to the Committee’s attention.” American Bar Association Project on Minimum Standards for Criminal Justice, *Fair Trial and Free Press*, p. 115 (Tentative Draft, Dec. 1966)

Other authorities indicate the absence of a mandatory statute does not mean that the court does not have the discretion to exclude persons from the preliminary hearing if substantial prejudice is likely:

“The Courts have always possessed the power to hold limited closed hearings. The exercise of this power does not constitute an interference with either freedom of speech or freedom of press.” Cooper, “The Rationale for the ABA Recommendations,” 42 *Notre Dame Lawyer* 857, 861, n. 18 (1967).

See also, 6 Wigmore, *Evidence*, Sec. 1835, p. 338 (3d ed. 1940). Cf., *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949); *United Press Ass’ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1959).

†Nev. Rev. Stat. Sec. 171.445 (1959), applies only to preliminary hearings and not to other pretrial hearings.

A further example of a similar order is found in *United States v. American Radiator & Standard Sanitary Corp.*, 272 F.Supp. 691, 702 (W.D. Pa. 1967), where the court interpreted *Estes* and *Sheppard* to give the court discretion to hold *in camera* hearings on pretrial motions even though there was no applicable rule of procedure:

“The function of the trial court is to conduct the whole proceedings—trial and pre-trial—in an atmosphere of dignity and integrity, so as to shield the trial process itself from external factors.

* * * * *

The remedies available to the parties before any harm is done to either side comes not at the time of trial when prejudice to the defendants and injustice to the public may prevail, but now at the inception when notice of such possibilities and likelihoods are presented in formal manner. I deem the time to act in this connection is now.” 272 F.Supp. at 702.*

In short, *Sheppard* squarely holds that trial courts must take “strong measures” to insure that a free trial is not abridged because of prejudicial publicity. Judge Gooding has found that it is substantially likely that these defendants’ rights will be denied at trial. It is a simple application of basic constitutional law for this Court to hold that, under the circumstances of this case, Judge Gooding has the discretion to hold a closed preliminary hearing and thus preserve defendants’ right to a fair trial.

*In a later opinion in the same case, Judge Rosenberg denied a second motion for a closed hearing, but specifically stated that the denial was based upon the particular facts and not upon any lack of authority on his part. 274 F. Supp. 790.

IV. The Failure of a State Trial Judge to Exercise Discretion as to Whether a Preliminary Hearing Should be Closed Denies Equal Protection of the Laws and Violates the Fourteenth Amendment.

The appellees should not be denied substantial rights solely because of the happenstance that they have been given a preliminary hearing rather than a grand jury proceeding. Any alternative to a grand jury indictment must afford a defendant due process. See *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884); *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed 2d 98 (1961); *Morford v. Fogliani*, 411 P.2d 122 (Nev. 1966), *cert. denied*, 385 U.S. 963, 87 S. Ct. 399, *rehearing denied*, 385 U.S. 1021, 87 S. Ct. 721 (1967). If the prosecution had proceeded under the grand jury provisions of the Arizona Rules of Criminal Procedure (Rules 81-108) the testimony offered to the grand jury could not be released by the express provisions of Rule 107. However, since the prosecution chose to proceed by complaint and preliminary hearing, the testimony will be disseminated because of the defendant's failure to exercise his discretion. This creates an invidious, unjustified discrimination and denies equal treatment to all citizens in the same category in at least two situations.

It is a basic element of due process and of equal protection that a person's rights should not be abridged as a result of the arbitrary exertion of power. See *Leland v. Oregon*, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952); *Hillard v. Arizona*, 362 F.2d 908 (9th Cir. 1966). Here, the arbitrary selection of a preliminary hearing proceeding instead of a grand jury proceeding has resulted in a substantial likelihood that the defendants' rights to a free trial will be abridged.

The likelihood of an unfair trial in this case can be greatly lessened by the simple exercise of the trial judge's discretion. Very significantly, the discretion of the trial judge has been greatly extended in grand jury proceedings. For example, in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959), the Court held that the disclosure of grand jury minutes in a federal criminal case is primarily within the discretion of the trial judge. This discretion has often been exercised liberally. See, e.g., *United States v. United Concrete Pipe Corp.*, 41 F.R.D. 538, 539 (N.D. Tex. 1966); *United States v. Pilnick*, 267 F. Supp. 791, 801 (S.D.N.Y. 1967). Since the grand jury system has been liberalized to permit the trial judge, in the exercise of his discretion, to provide advantages which are accorded to the defendant who is given a preliminary hearing, we believe that the correlative advantage must be given to the defendant who is taken through the preliminary hearing route: the trial judge must be accorded the discretion to rule that, under proper circumstances, the defendant will be given the substantial rights to which he would have been entitled had he been prosecuted by means of a grand jury. If such discretion is not recognized, the defendants here will be denied basic rights which are given to other defendants who, solely because of an arbitrary decision, are accorded the secrecy of a grand jury proceeding. Such unequal treatment is a flat denial of due process and of equal protection.

V. The Failure of the State Judge to Exercise His Discretion Invades the Appellees' Right to Privacy Which Cannot Be Restored by Any Appellate Process.

We deal with a sensational case in which the reputations of the appellees are likely to be ruined. If there is probable cause, then this is simply a misfortune they will have to

bear in order that the case may be tried. But if there is no probable cause it is simply inexcusable to allow them to be thus traduced by process of law—suffering injuries as to which they will have no recourse whatsoever.

The right to privacy has been recognized by the United States Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). Justice Douglas ruled in *Griswold* that certain unenumerated rights are created as a result of penumbras which are created by the specific guarantees in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. In fact, the existence of such unenumerated rights is specifically recognized by the Ninth Amendment:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

As stated by Justice Goldberg in his concurring opinion:

“The Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.” 381 U. S. at 492, 85 S. Ct. at 1686.

In *New York v. Story*, 324 F.2d 450 (9th Cir. 1963), this Court held that (1) the plaintiff’s right to privacy was violated by police officers who circulated photographs taken of the plaintiff in indecent positions under a claim of preserving evidence, and (2) that the plaintiff’s right to privacy was actionable in the federal district court under the Civil Rights Act and under the Fourteenth Amendment of the United States Constitution.

See also the concurring opinion of Judge Darr in *Roberts v. Clement*, 252 F. Supp. 835, 848 (E.D. Tenn. 1966), where

the court ruled that a statute was unconstitutional because it made the operation of a nudist colony or engagement in nudist practices a criminal offense:

"None who make it a point to keep current with United States Supreme Court rulings, particularly recent ones, could have any doubt that the right of privacy is now constitutionally protected. That Court has wisely recognized that the Constitution creates a 'right of privacy, no less important than any other right carefully and particularly reserved to the people.'"

We have an express finding in two courts of great and irreparable injury to the reputations of these appellees unless these hearings should be closed. There is no way of curing this injury; it can only be prevented.

As the Court noted in *Sheppard v. Maxwell*, *supra*, "we must remember that reversals are the palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception;" 384 U.S. at 363, 86 S. Ct. at 1522. Once a bell has been rung, it cannot be unrung. A permanent injunction should issue from this Court to protect these plaintiffs' constitutional right to privacy.

VI. The District Judge Chose a Sound Remedy.

In formulating its decree, the District Court was aware of conflicting traditional principles and values. On the one hand, as Chief Justice Marshall said in 1824, "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821). On the other hand, the federal courts will strive mightily "to avoid needless conflict with the administration by a state of its own affairs." Wright, *Fed-*

eral Courts, p. 169 (1963). The District Court sought to solve this problem by entering the following order:

“WHEREFORE IT IS ORDERED that a preliminary injunction issue against the defendants, restraining them from continuing any further open preliminary hearing in the matter now pending in the Superior Court of Arizona in and for the County of Maricopa entitled No. CR. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs*, pending clarification of the interpretation of Rule 27 of the Rules of Criminal Procedure for the State of Arizona, as amended by the Supreme Court of the State of Arizona.

“In implementation of the foregoing order, Mr. Corbin, County Attorney for Maricopa County, Arizona, and Mr. Martin, Deputy County Attorney for Maricopa County, Arizona, or either of them, are requested to institute appropriate proceedings in order that the Supreme Court of Arizona might have an opportunity to issue an utterance with respect to its interpretation of the Rule 27 as amended.”

This was a particularly wise approach in the instant case because, on the face of Rule 27, nothing does interfere with the discretion of a trial judge to determine how to administer his courtroom. The District Court was confronted with a ruling which it obviously thought was an erroneous construction of Rule 27; see Conclusion of Law No. 4, and T. 17 and 18. In view of the fact that the Supreme Court of the State had denied the writ of mandamus without opinion, the Federal District Court chose to subordinate tentatively his own interpretation of Rule 27 to that of the State trial judge.

The District Court has devised its own form of the abstention doctrine to fit this case. On the one hand, the constitutional rights of the appellees are protected until appli-

cation can be made to the State courts. While the federal court could decide the State law question as an ancillary State issue, "The wisdom of exercising such jurisdiction is doubtful." Wright, *supra*, p. 170. By the order of the District Court, the constitutional rights of the appellees are preserved while the State may, if it wishes, apply to a higher State court to determine the matter of State practice. It may be that upon such an interpretation, the constitutional question will disappear and that the instant suit may be dismissed. Yet if the constitutional question must be decided, the order of the District Court makes it ripe for decision. The device chosen by the District Court does as much as can be done to preserve the rights of the individuals on the one hand, and the rights of the State on the other.

CONCLUSION

The petitions for special writs should be dismissed. Treating the main matter as an appeal, the judgment of the District Judge should be affirmed.

Respectfully submitted,

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*Attorney for Appellee Scroggs**

March, 1968

*The foregoing counsel also appear for Judge Craig, the nominal respondent in the application for special writs in the matter concerning their clients.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN P. FRANK

(Appendix A Follows)





Appendix A

*In the United States District Court
for the District of Arizona*

No. Civ-6597 Phx.

Ron Kent Hooper and Purvis Ole Scroggs,
Plaintiffs,

vs.

Honorable William H. Gooding, Judge of the
Superior Court of the State of Arizona,
and the State of Arizona, by Robert Cor-
bin, County Attorney of Maricopa County,
Arizona,

Defendants.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

The above entitled cause came on for hearing before this Court February 26, 1968, upon plaintiffs' complaint for a temporary restraining order and for injunction. There were present counsel for plaintiffs and counsel for defendants. Memorandum in support of plaintiffs' position was submitted February 26, 1968.

Both counsel concurred that, if the presiding judge at the preliminary hearing before the Honorable William H. Gooding, Judge of the Superior Court of the State of Arizona, had the inherent power to exclude the public in cause No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs*, then pending, the cause referred to was an appropriate cause for the Court to exercise its discretion in favor of a closed hearing.

Counsel for plaintiffs urged that the presiding judge at the preliminary hearing retained the inherent power to exercise his discretion, for good cause, in favor of a closed

hearing, regardless of the amendment to Rule 27 of the Rules of Criminal Procedure promulgated by the Supreme Court of the State of Arizona.

Counsel for defendants urged that, regardless of whether there was good cause, the presiding judge at the preliminary hearing had no inherent power to exercise his discretion because of the amendment to Rule 27 promulgated by the Supreme Court of the State of Arizona January 29, 1968, effective February 1, 1968, and must, therefore, require that all preliminary hearings must be open to the public.

At the conclusion of the hearing, and on February 26, 1968, this Court entered a temporary restraining order against the Honorable William H. Gooding, Judge of the Superior Court of the State of Arizona, and Robert Corbin, County Attorney of Maricopa County, Arizona, directing said defendants to abstain from any further open preliminary hearing in cause No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs*, until Monday, March 4, 1968, or until further order of the Court.

Thereafter, by stipulation entered into between counsel for plaintiffs and counsel for defendants dated February 29, 1968, the hearing set for Monday, March 4, 1968, to determine whether a preliminary injunction should issue was continued to Friday, March 8, 1968, and is was so ordered March 1, 1968.

On March 7, 1968, counsel for plaintiffs filed a supplemental memorandum. On March 8, 1968, defendants filed their answer with supporting memorandum. The matter was presented and argued to the Court on March 8, 1968. At the conclusion of the hearing, based upon evidence presented, the arguments of counsel and the memoranda submitted, this Court concluded it had jurisdiction of the matter pur-

suant to Title 28 U.S.C. § 1343 and Title 42 U.S.C. § 1983, and the Court ordered that a preliminary injunction issue against the defendants with respect to any preliminary hearing open to the public in the matter of *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs* until such time as the Supreme Court of the State of Arizona might have an opportunity to clarify interpretation of Rule 27 of the Rules of Criminal Procedure as amended January 29, 1968, effective February 1, 1968. At that time the Court further instructed Mr. Martin, appearing on behalf of the defendants, or Mr. Corbin, County Attorney of Maricopa County, to institute appropriate proceedings in order that the Supreme Court of Arizona might have the opportunity to make an utterance clarifying the interpretation of Rule 27. At the same time the Court advised counsel for plaintiffs and counsel for defendants, should they care to have a formal order, they might collaborate for the purpose of presenting a proposed order not inconsistent with what the Court stated orally from the bench.

Thereafter, on March 15, 1968, counsel for plaintiffs submitted a proposed formal order advising counsel for defendants that the matter had been requested to be heard March 18, 1968.

On March 18, 1968, it appeared that counsel for defendants and counsel for plaintiffs could not agree as to the material contained in the proposed formal order. On March 19, 1968, counsel for plaintiffs submitted an amended proposed findings of fact, conclusions of law and judgment, and counsel for defendants submitted objections thereto.

In view of the foregoing recitation of the status of this cause, this Court makes the following findings, conclusions and order in conformity with its oral ruling of March 8, 1968.

FINDINGS OF FACT

1. At the time this action was instituted in this Court a preliminary hearing was pending in the Superior Court of the State of Arizona in and for the County of Maricopa entitled No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs*.

2. Counsel for the defendants in the State Court proceeding moved to the presiding judge at the preliminary hearing to exclude the public from the hearing, stating to the Court the grounds for their motion.

3. The grounds for the motion presented by counsel for the defendants Hooper and Scroggs are set forth in the record of this Court as Exhibit A, attached to plaintiffs' complaint.

4. In response to counsel's motion in the State cause, the County Attorney stated that he could not, in good faith, disagree with the statement presented to the Court by counsel for defendants, except for one point, to-wit: that the amendment to Rule 27 of the Arizona Rules of Criminal Procedure constituted a mandate from the Supreme Court of Arizona to the lower courts that all preliminary hearings must be open and that the lower Court had no inherent power to exercise its discretion, for good cause, to close a preliminary hearing (Tr. State Court Proceedings, pp. 8-9).

5. The presiding Judge in the State Court proceeding found:

(a) that in the cause before it there had been substantial pretrial publicity prior to the time of the preliminary hearing;

(b) that evidence would be produced at the preliminary hearing which very well might not be admissible at the time of trial, if there was a trial;

(c) that one of the defendants in the cause before it was a professional man; that the other was a businessman; that any publicity in connection with the matters then before the Court would be detrimental to their professional and business reputations, and affect their livelihoods;

(d) that the amendment to Rule 27 of the Arizona Rules of Criminal Procedure constituted a mandate from the Supreme Court of Arizona that the Superior Court of Arizona, or a Magistrate could not in its discretion exclude all persons from a preliminary hearing.

6. Subsequent to the decision of the Superior Court of the State of Arizona in and for the County of Maricopa hereinabove referred to, counsel for the defendants made application to the Court of Appeals of Arizona for a writ of mandamus, directing the Superior Court to close the preliminary hearing to the public.

7. The record discloses that the Court of Appeals of Arizona did not accept the application for the writ, and suggested to counsel that the application be presented to the Supreme Court of the State of Arizona.

8. Upon presentation of the application to the Supreme Court of Arizona, the Court denied the application without comment.

9. Counsel for the defendants in the State action then instituted these proceedings before this Court.

10. Based upon the findings of the presiding judge in the State Court proceeding, and the record in this Court, this Court further finds that there has been substantial pre-trial publicity prior to the preliminary hearing in the State Court.

11. This Court further finds that there will be a likelihood of the presentation of evidence at the preliminary hearing in the State Court which may very well not be ad-

No. 22,670 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, a labor organization,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a California non-
profit corporation, and INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION, a labor or-
ganization,

Appellees.

APPELLANT'S OPENING BRIEF.

KENNETH W. GALE,
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*Attorney for Appellant, International Long-
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Local 13.*

FILED

JUN 10 1968

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No. 22,670

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, a labor organization,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a California non-
profit corporation, and INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION, a labor or-
ganization,

Appellees.

APPELLANT'S OPENING BRIEF.

I. STATEMENT OF JURISDICTION.

Plaintiff's and appellants, International Longshoremen's and Warehousemen's Union, Local 13 (hereinafter referred to as "plaintiff" or "plaintiff, Local 13,") initially brought the within action by petition in the Superior Court of the State of California for the County of Los Angeles. The defendants and appellees, International Longshoremen's and Warehousemen's Union, (hereinafter referred to as the "international" or "International Union,") and defendant and appellees, Pacific Maritime Association (hereinafter referred to as "PMA,") each filed separate petitions for removal to the United States District Court. The separate petitions brought about two separate cases in the District Court which were subsequently consolidated in one case under number 65-1414-S and thereafter assigned to 65-1414 AAH.

An amended complaint was filed in the District Court which provided in substance that the plaintiff, Local 13 and the defendant, International Union were labor organizations under the provisions of the Labor Management Relations Act and the P.M.A. was an employer under the provisions of the Act. That a collective bargaining agreement existed that had been entered into between the P.M.A. and the International on behalf of and for the benefit of its locals and their members, including plaintiff, Local 13 and its members. [TR. pp. 65-109.]

The amended complaint further alleged that the P.M.A. blackballed a former Local 13 official, Pete Velasquez, then brought about arbitration proceedings against plaintiff before an area arbitrator who rendered an award and that the award was then appealed to the Coast Labor Relations Committee, who referred the matter to the Coast Arbitrator who rendered a

decision affirming the Area Arbitrator and deregistering a former official of plaintiff (Pete Velasquez) for activities allegedly carried out by Pete Velasquez when he was employed solely by plaintiff as an official of plaintiff, Local 13.

The amended complaint alleges that the Area Arbitration had by the P.M.A. in respect to charges brought against Pete Velasquez for matters allegedly occurring while he was solely employed by plaintiff as a union official were had *ex parte*. The complaint sets forth that the proceedings had before the Area and Coast Arbitrators were in excess of the powers of the arbitrators and were made and procured by corruption, fraud and undue means and with evident partiality on the part of the arbitrators, with an indifference to and manifest disregard for the facts, and upon grossly erroneous findings and conclusions and that the decisions and awards were void and should be vacated and set aside. [TR. pp. 72, 73.]

The complaint further sets forth that the aforesaid acts of the arbitrators were carried on as part of a connivance and conspiracy between the arbitrators and defendants to wrongfully modify Sec. 17.81 of the Collective Bargaining Agreement to apply its provisions to officers of plaintiff Local 13 and to penalize them for activities carried on as union officials. [TR. p. 73.] The complaint further brought in the International as a defendant on the ground that the International was united in interest with plaintiff and was unwilling to join in bringing the action. [TR. p. 67.]

The second cause of action realleged paragraphs I through XX of the first cause of action and set forth facts whereby it was alleged that the arbitrators' decisions and awards were void as being contrary to public policy as provided and made by the National Labor Policy of the United States of America and the policy

set forth in the Labor Management Relations Act, 29 U.S.C., Sections 157, 158, and 185. [TR. p. 67.]

The District Court had jurisdiction to hear the cause under Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185; having jurisdiction to hear the cause the District Court then had further jurisdiction to grant the remedies and relief provided for in the Arbitration Act, 9 U.S.C., Sections 1 through 14. Though not entirely necessary for the within proceedings, due to the connivance and conspiracy of the defendants and the subsequent deprivation of plaintiffs' members of their rights, the District Court had further and additional jurisdiction under 28 U.S.C., Sec. 1337.

This Honorable Court has jurisdiction by virtue of 28 U.S.C., Section 1291.

II.

STATEMENT OF THE CASE.

A. Background of the Cause.

1. Matters Preliminary to the Arbitration.

Plaintiff is an autonomous local of defendant International Union; plaintiff's "Constitution-By-Laws-General Rules" are attached to plaintiff's complaint as Exhibit "C". [TR. p. 86.] The officers of Local 13, which includes "Business Agents" (Day and Night) are set forth in Article II of the Constitution, commencing on page 5 with their duties being set forth in Article III, commencing on page 6. Among other matters, the duties of a business agent are as follows:

"Article III Duties of Officers

"Section 4, Business Agents:

"a. The Business Agents (Patrolmen) shall be the representative of the local in the loading and discharging of all vessels governed by our contract and of all other work under the jurisdiction of this Local." * * *

“h. They shall perform such other duties as the Local may assign them, and at the expiration of their term, recall, removal or resignation, turn over to the Local all properties which they have in their possession that belong to this Local.”

Defendants, P.M.A. and International Union entered into a Collective Bargaining Agreement, which is referred to as the Pacific Coast Longshore Agreement, a copy of which is attached to plaintiff's complaint as Exhibit “A”. [TR. p. 53.] Paragraph 1, page 1, of the Agreement provides that the International Union entered into the Agreement:

“* * * on behalf of itself and each and all of its longshore locals in California * * * and all employees performing work under the scope, terms, and conditions of this agreement.”

The Collective Bargaining Agreement further provided penalties for misconduct of longshoremen working under the Agreement. The present litigation arises out of the application of one of the penalty provisions which is set forth as Section 17.81, commencing on page 75 of the Collective Bargaining Agreement with the applicable portions providing [TR. p. 53]:

“17.81 all longshoremen shall perform their work conscientiously and with sobriety and with due regard to their own interest shall not disregard the interests of the employer. Any employee who is guilty of deliberate bad conduct in connection with his work as a longshoreman or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offense, cancelled from registration. * * *”

Section 1.71 of the Pacific Coast Longshore Agreement further provides:

“1.71 The term ‘longshoreman’ as used herein shall mean any man working under this Agreement.”

The cause before the District Court was to set aside an arbitration decision made against plaintiff Local 13 by the Area Arbitrator, Germain Bulcke, (Appendix I herein) and affirmed by the Coast Arbitrator, Sam Kagel, who, upon the decision, deregistered a former plaintiff Local 13 Business Agent, Pete Velasquez, from all future work under the Collective Bargaining Agreement. (Appendix II herein.) The P.M.A. represents the vast majority of the employers who employ longshoremen and members of plaintiff's local and the deregistration of Pete Velasquez was tantamount to excluding him from all work in the industry. [TR. p. 400, Velasquez pars. 17 and 18; TR. p. 394, Velasquez par. 3.]

Pete Velasquez was an official (Business Agent) of plaintiff from October, 1962 to October, 1964, except for the period of from June 20, 1964 to July 15, 1964, at which time he was suspended from office by the President and Executive Board of Plaintiff, Local 13 for his association with company officials and supervision. [TR. p. 395 Velasquez par. 3.] During his employment as Business Agent of Local 13, Velasquez did not engage in any function or employment under or pursuant to the Collective Bargaining Agreement (Pacific Coast Longshore Agreement), nor did he engage in any longshore activities. During such period of time his sole employment was pursuant to the "Constitution, By-Laws, and General Rules" of Local 13 as a salaried officer of the local. [TR. pp. 395, 396, Velasquez pars. 6, 7.]

Velasquez left office in October, 1964, due to the fact that under Article II, Section 3, of the "Constitution, By-Laws, and General Rules" and officer's tenure is limited to two terms (2 years) then he must be out of office for an equal period of time before being eligible to run for office again. However, to be able to again run for office, under Article IV, Section 1, Subd.

E of the Constitution, he must be an “active longshoreman in the industry.” [TR. p. 394.]

During his tenure as an official of plaintiff Local 13, Pete Velasquez was engaged in carrying out his duties under the local’s Constitution and By-Laws and the orders and directions of his superior, the President of plaintiff Local 13 and the policies and instructions of the President of defendant International Union. [TR. pp. 395-397, Velasquez pars. 7, 8 and 9.]

After Pete Velasquez left office of Local 13 in October, 1964, he returned to his prior employment as a longshoreman working as a winch driver in longshore Gang No. 55. [TR. p. 400, Velasquez par. 18.] Robert Carney was the senior member of Gang No. 55 and in charge thereof performing his duties as a hatch tender. [TR. p. 416, Carney par. 3.] As hatch tender Robert Carney was the safety man of the gang and among his duties included the administration and observance of the Pacific Coast Marine Safety Code. [TR. pp. 414-416, Carney pars. 1, 2 and 3.]

After Pete Velasquez returned to his employment two incidents arose. On November 23, 1964, Gang No. 55 was dispatched for employment with Jones Stevedoring Co. to work aboard the “SS HAI HSIN”. When the gang reported to work it was “sold and shifted” to work aboard the SS MICHIGAN for Crescent Wharf and Warehouse Company. Gang No. 55 was thus sold and shifted to complete an eight (8) hour guarantee which terminated 3:00 A.M. November 24, 1964, and beyond which time the shifted gang was not required to work. [TR. pp. 416, 417, Carney pars. 3, 4 and 6.] Prior to 3:00 A.M. the gang boss, Robert Carney, was informed that the gang would be requested to work beyond 3:00 A.M. Mr. Carney then told the company’s ship boss, Vern Richards, that “the gang was shifted only to finish our eight-hour day”. The ship boss then

stated, "Do as you please." [TR. pp. 417, 418, Carney par. 7.]

When Carney started to advise the gang of the request to work over, the members started to request replacements. Pete Velasquez, who was at the time actively engaged in the driving of winches, was among the last to be informed of the request to work over, and he himself requested a replacement. The replacements arrived prior to 3:00 A.M. and the company refused to allow them to work and members of Gang No. 55 departed. [TR. p. 418, Carney, pars. 8 and 9.] Gang No. 80 was employed aboard the vessel in another hatch and was also asked to work extended time beyond 3:00 A.M. Gang No. 80 also called replacements and the company also refused to let Gang No. 80's replacements turn to and Gang No. 80 left the job. There was never any disciplinary action taken against any members of Gang No. 80 for calling replacements or failing to work an extended shift. [TR. pp. 418, 419, Carney pars. 10 and 11.]

The second incident arose after Gang No. 55 was dispatched to work aboard the SS PRESIDENT QUEZON on November 30, 1964. The gang commenced work in No. 4 hatch. On commencing work it was found that the brakes on the winch were defective and wouldn't hold a load, therefore the gang was shifted to another hatch while the winch was being repaired. [TR. p. 419, Carney pars. 11-13.]

Gang No. 55 again reported to work aboard the SS PRESIDENT QUEZON on the 1st day of December, 1964, and prior to 6:00 P.M. learned that the port boom of No. 4 hatch had been dropped, damaging the superstructure of the vessel and leaving physical evidence of the impact upon the boom. [TR. p. 419, Carney par. 14.] Robert Carney requested a static test of the boom, prior to its use, and the company advised him that they would call a safety inspector to check the boom

and the gang was put to work in No. 6 hatch. Tony Mignano, a Federal Safety Inspector, came aboard the vessel and looked at the boom. [TR. p. 420, Carney par. 15.]

During the 10:00 to 11:00 P.M. meal hour Germain Bulcke, the Area Arbitrator, came aboard the vessel and was told that the Federal Safety Inspector had been on board and said that the boom was safe as far as he could see but that there was no way that he could tell whether the boom was safe or not without a static test and had recommended that a static test be made. The Area Arbitrator first stated that he did not believe that the matter was arbitratable as he was not a safety engineer and should not have been called out. Thereafter, without even so much as a visual inspection of the boom, the Area Arbitrator ruled that the boom was safe. [TR. p. 420, Carney pars. 16 and 17.]

Robert Carney who was in charge of the gang and its safety, felt that the decision of the Area Arbitrator was improper and therefore offered to work the hatch using the boom on a swinging boom basis. The company refused the offer and Robert Carney then offered to have the gang work the hatch on any other manner other than use the damaged boom, or in the alternative to work any other hatch of the ship or that the gang would call replacements which were available and could be on the job in ten (10) minutes. The company superintendent, Mike Longmire, then made a telephone call, then had a conversation with Mr. Wallen, the ship boss, and then advised the Union's night business agent, Mr. Brady, that Gang No. 55 was fired. [TR. p. 421, Carney, pars. 19-21.]

The Company took the above action and discharged the gang after the 10:00 to 11:00 P.M. meal period, even though it was relatively easy to give the boom a static test and had the boom passed the test, the gang

could have been working on No. 4 hatch by 7:30 P.M. [TR. p. 420, Carney, par. 18.] The static test would have taken about forty-five (45) minutes and cost about \$50.00. [Ans. to Interrogatory No. 7, TR. pp. 185 and 186.]

Harry Bridges, President of the defendant International, extended no assistance in the matter even though his previous instructions provided as follows:

“Take the case cited by Bob Baker. Here is a man who has been on the job. He is on the winch and he is handling a big load. As that winch driver he figures those winches can’t handle it. He is a hundred percent right. And some arbitrator (*even one of our own*) is going to come along and say ‘As far as I am concerned it’s safe’. It doesn’t matter a damn. He is going to take that load and take a chance of hurting our people? Why, he ought to be run off the job! Any local that lets that happen is not doing its job. * * *”

“* * * If there is anybody on the job being forced to work under unsafe conditions, that is our fault. It is not the shipowner’s fault. They are bound to try it. It is our fault. And doggone it! Let’s put a stop to it. * * *” [TR. p. 396, Velasquez par. 7.]

Further Section 11.41 of the Pacific Coast Longshore Agreement provides [TR. p. 53]:

“11.41 Longshoremen shall not be required to work when in good faith they believe that to do so is to immediately endanger health and safety. Only in cases of bona fide health and safety issues may a standby be justified. The union pledges in good faith that health and will not be used as a gimmick. Supplement III sets forth the agreed procedure with respect to disputes on health and safety.”

The following night, December 2, 1964, Mr. McEvoy who was in charge of defendant P.M.A. in the Wilmington-Long Beach area, stated to Mr. Robert Carney that, "We're" out to get Pete Velasquez and have him deregistered for the things he had done as the Union's Business Agent. When asked why, McEvoy stated, "Pete knows the contract too well." [TR. p. 421, Carney par. 22.] Pete Velasquez had, while in office, handled the disputes arising under the Pacific Coast Longshore Agreement and had won substantially all the disputes including substantially all of the arbitrations. [TR. p. 397, Velasquez par. 9.]

On the following day, December 3, 1964, two complaints were before the Joint Port Labor Relations Committee. One complaint being Company Complaint No. 289 filed by the employer, Marine Terminals, against Gang No. 55; the second complaint being UC 634 brought by the plaintiff Local 13 against the company, Marine Terminals Corporation, alleging wrongful discharge of Gang No. 55. Disagreement was reached on both complaints and the matters were referred to Joint Area Labor Relations Committee pursuant to Section 17.24 of the Collective Bargaining Agreement. [TR. p. 433, Johnston pars. 5 and 6.]

Section 17.11 of the Pacific Coast Longshore Agreement provides:

"17.11 The parties shall establish and maintain, during the life of this Agreement, a Joint Port Labor Relations Committee for each port affected by this Agreement, four Joint Area Labor Relations Committees, and a Joint Coast Labor Relations Committee. Each of said labor relations committees shall be comprised of three or more representatives designated by the Union and three or more representatives designated by the Employers. Each side of the committee shall have equal vote."

Section 17.24 of the Collective Bargaining Agreement provides:

“17.24 In the event that the Employer and Union members of any Joint Port Labor Relations Committee shall fail to agree upon any question before it, such question shall be immediately referred to at the request of either party to the appropriate Joint Area Labor Relations Committee for decision.”

Immediately after the referral to the Joint Area Labor Relations Committee, defendant P.M.A.'s Southern California Area Manager, John D. McEvoy, made a motion that Pete Velasquez be deregistered. Attached to said motion was fifteen (15) charges made against Pete Velasquez. The Committee disagreed and the matter was referred to the Area Labor Relations Committee. John McEvoy then presented plaintiff Local 13 with a typewritten statement blacklisting Pete Velasquez from all employment through companies which were signatory to the Pacific Coast Longshore Agreement, until all cases against Pete Velasquez were resolved. Plaintiff objected to the blacklisting as being employer unilateral action which was in complete violation of the Pacific Coast Longshore Agreement. [TR. p. 434, Johnston pars. 8, 9, and 10.] The above complaints went as far back as April, 1959. (Appendix I, Bulcke award.)

Never before had a member of the Longshore industry been blacklisted or placed upon a non-dispatch list preventing him from working for all employers who were a party to the Collective Bargaining Agreement, and no member had ever remained on a non-dispatch list after a complaint against him had been processed through the Joint Port Labor Relations Committee. The defendant P.M.A. put their blacklisting into effect

and Pete Velasquez was prevented from obtaining further work. Plaintiff Local 13 then filed a further complaint objecting to the blacklisting and disagreement was reached on the complaint. The P.M.A. refused to waive the Joint Area Labor Relations Committee and allow the matter of the blacklisting to go to the Area Arbitrator for a ruling. [TR. pp. 435, 436, Johnston, pars. 14-17.]

A special Join Area Labor Relations Committee meeting was had December 8, 1964, with J. Paul St. Sure, President of defendant P.M.A. present and Harry Bridges, President of defendant International Union present. P.M.A. President, Paul St. Sure, stated that Pete Velasquez would not be reinstated unless Local 13 would agree to package all of the complaints against Pete Velasquez up and refer them directly to the *Coast Arbitrator* along with the employer's motion to deregister Pete Velasquez. This Local 13 refused to do and demanded that their complaint respecting the blacklisting of Pete Velasquez be referred to the *Area Arbitrator*. The P.M.A. refused to allow said complaint to go to the Area Arbitrator. [TR. p. 437, Johnston par. 20.]

Thereafter Paul St. Sure proposed that all complaints against Pete Velasquez be heard by the Joint Area Labor Relations Committee meeting of December 14, 1964, and if necessary then the complaints against Pete Velasquez would thereafter be presented to the Area Arbitrator and stated that only if plaintiff Local 13 would agree to the foregoing would Pete Velasquez be removed from the non-dispatch list. [TR. p. 437, Johnston par. 20.] In order that Pete Velasquez could be taken off the non-dispatch list and by reason of the P.M.A.'s then and past further harassment and coercion against plaintiff Local 13 which was acquiesced in by defendant International Union, including a long lock-out

of plaintiff Local 13 by defendant P.M.A., plaintiff agreed to the latter proposal. [TR. pp. 437, 438, 448 and 450, Johnston pars. 21, 22, 47, 48 and 55.]

The complaints were processed through the Joint Area Labor Relations Committee and the parties reached disagreement thereon. The defendant P.M.A. then referred the complaints to arbitration. [TR. p. 438, par. 23.]

2. The Arbitration.

The arbitration was commenced by defendant P.M.A. against plaintiff Local 13, the defendant P.M.A. having initiated proceedings before the area arbitrator.

The provision of the Pacific Coast Longshore Agreement strictly limits the powers of the arbitrators, Section 17.52 provides in part:

“Powers of the arbitrator shall be limited strictly to application and interpretation of the agreement as written. * * *”

Section 17.53 provides in part:

“Arbitrators’ decisions must be based upon the showing of facts and their application under the specific provisions of the written agreement and be expressly confined to, and extend only to, the particular issue in dispute.”

Section 17.62 provides in part:

“The arbitrator shall act with his powers limited strictly to the application and interpretation of the Agreement as is written.”

The arbitration was commenced on January 4, 1965, before the Area Arbitrator Germain Bulcke and a record of the proceedings were made by a Certified Short-hand Reporter. Plaintiff in opposition to defendants’ motion for summary judgment introduced into evidence a copy of the reporter’s transcript as Exhibit “6A 6B and 6C.”

Plaintiff Local 13 participated in the arbitration of the first four (4) complaints which were subsequently decided in the opinion and decision of the Area Arbitrator as cases numbered 1, 2, 3, and 4 respectively. The cases in which Local 13 participated involved Pete Velasquez as a working Longshoreman. [TR. pp. 438-439, Johnston par. 24.] However, Local 13 refused to arbitrate or submit to arbitration any of the remaining complaints as each of said complaints involved Velasquez in his capacity as a duly elected official of Local 13 and while he was solely employed by and paid by plaintiff, Local 13 and at a time when he was not performing any function under the Pacific Coast Longshore Agreement either as a Longshoreman, employee or otherwise. (Appendix I, Bulcke p. 2.) [TR. p. 439, Johnston par. 25.]

Local 13 refused to arbitrate or submit the remaining complaints to arbitration on the stated ground that to arbitrate the complaints was against both Federal and State Laws and that arbitration regarding a union official did not come under Section 17.81 of the Pacific Coast Longshore Agreement. [Ex. 6; TR. p. 439, par. 36.]

After Local 13 refused to arbitrate the remaining eight (8) cases which involved Velasquez as a Union official and during the evening of January 4, 1965, the then President of Local 13, Curt Johnston, who had stated the position of the Local and had refused to arbitrate, received a phone call from the Area Arbitrator Germain Bulcke. During the call Bulcke attempted to induce Johnston to continue and arbitrate the remaining eight (8) complaints against Pete Velasquez. During the conversation the Area Arbitrator stated, "but it would look better even though we both know Velasquez is guilty and heaven knows I have tried to help this guy, if you would be there to at least go through the mo-

tions". Johnston then told Bulcke that he couldn't go through the arbitrations as he didn't believe that Section 17.81 applied to union officials and that Bulcke did not have jurisdiction to proceed with the arbitration which would be against both Federal and State laws. [TR. pp. 439-440, Johnston par. 27.] The Area Arbitrator and the P.M.A. thereafter proceeded to arbitrate the remaining eight (8) cases *ex parte* without the consent or permission of plaintiff and against plaintiff's desire. [TR. pp. 440, 441, Johnston par. 29.]

Section 17.281 of the Pacific Coast Longshore Agreement provides:

"17.281 Should either party fail to participate in any of the steps of the grievance machinery, the matter shall automatically move to the next higher level."

Section 17.282 of the Pacific Coast Longshore Agreement provides:

"17.282 If the local grievance machinery becomes stalled or fails to work, the matter in dispute can be referred at once by either the Union or the Association to the Joint Coast Labor Relations Committee for disposition."

The P.M.A. did not avail themselves of the provisions of Section 17.281 and move the dispute to the next higher level or any of the complaints therein. Instead the P.M.A. induced the Area Arbitrator to proceed under Section 17.61 of the Agreement which provides (Appendix I, p. 2):

"17.61 When a grievance or dispute arises on the job and is not resolved through the steps of 17.21 and 17.22, and it is claimed that work is not being continued as required by Section 11, a request by either party shall refer the matter to the Area Arbitrator (or by agreement of the Joint Coast

Labor Relations Committee to the Coast Arbitrator) for his consideration in an informal hearing; such referral may be prior to formal disagreement in any Joint Labor Relations Committee or upon failure to agree on the question in the Joint Area Labor Relations Committee. Such hearing may be *ex parte* if either party fails or refuses to participate, provided that the arbitrator may temporarily delay an *ex parte* hearing to permit immediate bona fide efforts to settle an issue without a hearing.”

Such a procedure as set forth in Section 17.61 provides for on-the-job arbitration when the work is not proceeding as required by Section 11. The Area Arbitrator took such action even though the alleged eight (8) complaints involved matters that had transpired long before the arbitration, and had already been through the Joint Port and Area Labor Relations Committees. The Area Arbitrator proceeded *ex parte* even though there was no contention or issue in respect to work proceeding as required by Section 11 and there could be no such issue as the complaints involved matters which had transpired long before the date of the arbitration and did not and could not involve work that was proceeding. [TR. p. 441, Johnston pars. 30 and 31.]

The Area Arbitrator rendered his “opinion and Decision” February 12, 1965, embodying all complaints in one “Opinion and Decision” but deciding each case therein separately. (Appendix I.) The decision in respect to complaint No. 212 (Case No. 1) found Pete Velasquez not guilty. In respect to complaints numbered E.C.61 and E.C.386 (Case No. 2) the Arbitrator found that the complaints did not support the employer’s contention. That in respect to the remaining ten (10) complaints, the Area Arbitrator found Pete

Velasquez guilty (Cases 3 through 12). The ten (10) cases included two complaints against Pete Velasquez when he was employed as a Longshoreman, complaint No. E.C.373, Case No. 3, and complaint No. E.C.363, Case No. 4.

Case No. 3, E.C.373, involved the matter of the SS PRESENT QUEZON and Case No. 4, E.C.363, involved the matter of the SS MICHIGAN. Said matters having previously been set forth as the two events which transpired shortly after Pete Velasquez left office as a union official. The remaining eight (8) cases of which Velasquez was found guilty were each cases involving Velasquez as a union official a fact that was clearly shown in the Area Arbitrator's decision. (Appendix I, Bulcke Decision pp. 8-16.) [TR. p. 614, Court Finding No. 12.]

Section 17.261, page 67, of the Pacific Coast Longshore Agreement provided as follows:

"17.261 Any decision of a Joint Port or Joint Area Labor Relations Committee or of an Area Arbitrator claimed by either party to conflict with this Agreement shall immediately be referred at the request of such party to the Joint Coast Labor Relations Committee (and, if the Joint Coast Labor Relations Committee cannot agree, *to the Coast Arbitrator, for review*). * * *" (Emphasis added.)

The opinion and decision of the Area Arbitrator was then appealed to the Joint Coast Labor Relations Committee which disagreed on the matter and referred the matter to the Coast Arbitrator Sam Kagel, which was the final step in the grievance procedure. [TR. p. 442, Johnston par. 33; TR. p. 615, Court Finding No. 15.]

Section 17.15 of the Pacific Coast Longshore Agreement provides:

“17.15 The grievance procedure of this Agreement shall be the exclusive remedy with respect to any disputes arising between the Union or any person working under this Agreement or both, on the one hand, and the Association or any employer acting under this Agreement or both, on the other hand, and no other remedies shall be utilized by any person with respect to any dispute involving this Agreement *until the grievance procedure has been exhausted.*” (Emphasis added.)

The Union's prior complaint, U.C. 634, regarding the blacklisting of Pete Velasquez was heard before the Area Arbitrator. The Area Arbitrator in his opinion and decision held that the placing of Pete Velasquez on the non-dispatch list was a violation of Section 17.15 of the Pacific Coast Longshore Agreement and made an award to Pete Velasquez for his loss of earnings. [TR. pp. 442, 443, Johnston par. 35.]

After the opinion of the Area Arbitrator and prior to the hearing of the Coast Arbitrator, the President of the defendant International, Harry Bridges, stated to Pete Velasquez that he (Velasquez) was done, finished, and all washed up and he might as well know it and that if the issue of deregistration got to the Coast Arbitrator that he was done, that his only hope was himself Bridges, with Bridges finishing by telling Velasquez. “You're through, you're all washed up.” [TR p. 447, Johnston par. 45.]

At hearings before the Coast Arbitrator it was the procedure that the International Union conduct the Union's portion of the hearing on behalf of the Local. [Ex. 7 transcript Coast Arbitration; Court Finding Nos. 15, 16, TR. p. 615.] The decision of the

Coast Arbitrator was based on the record of the proceedings had before the Area Arbitrator and the Area Arbitrator's decision. [Ex. 7, pp. 4-7.] The spokesman for the International Union was Link Fairley. [Ex. 7, p. 2.] During the hearing, the International President, Harry Bridges, acquiesced in the employers' position that Section 17.81 of the Pacific Coast Longshore Agreement applies to union officials. [Ex. 7, pp. 10-13; Ex. 7, p. 3, lines 14-25.]

This statement was made by Harry Bridges even though such a position had never been taken before [Ex. 7, p. 15, lines 3-6; TR. p. 445, Johnston par. 42] and such an interpretation had never been previously given to the section or approved by the membership, nor had an official even been previously charged under the section though stronger occasions had previously arisen for such a charge. [TR. p. 445, Johnston par. 46.]

The Coast Arbitrator Sam Kagel rendered his "Opinion and Decision" June 29, 1965, deregistering Pete Velasquez from all employment under the Pacific Coast Longshore Agreement. (Appendix II, p. 6.) Subsequent thereto and on or about the 23rd or 24th of August, 1965, the President of defendant International Union, Harry Bridges, stated to Sam Puccio, Local 13's Vice-president, that they had two arbitrations going and they had a deal working on the arbitration involving the belly-packing sacks matter and the Pete Velasquez case and they had to sacrifice Pete Velasquez to gain the belly-packing sacks issue. [TR. p. 424, Puccio.] Both awards had come down at the same time and the decision of the belly-packing award was before the lower court. [TR. pp. 426-430, Ex. Puccio aff.]

When the Coast Arbitrator Sam Kagel rendered his decision he deregistered Pete Velasquez based not on

the two (2) matters arising out of Velasquez' employment as a Longshoreman (Appendix I cases 3 and 4) but on the two matters combined with the complaints arising out of alleged activities of Velasquez as a union official. (Appendix II, p. 6, Comment on award.) The Coast Arbitrator had before him the record before the Area Arbitrator including the reporter's transcript of the proceedings. [Ex. 7, p. 6, lines 15-16.]

Section 17.82 of the Pacific Coast Longshore Agreement provided:

"17.82 The Joint Port Labor Relations Committee has the power and duty to impose penalties on longshoremen who are found guilty of stoppages of work, assault, refusal to work cargo in accordance with the provisions of this Agreement, or who leave the job before relief is provided, or who are found guilty of pilfering or broaching cargo or of drunkenness or who in any other manner violate the provisions of this Agreement or any award or decision of an arbitrator."

The Coast Arbitrator levied the penalty of deregistration against Pete Velasquez. This was done even though at all times prior thereto the penalties were levied by the Joint Port Labor Relations Committee after a finding of guilt by the Area Arbitrator; neither the Area nor the Coast Arbitrator having the power to levy penalties and the Coast Arbitrator being restricted to a review on appeal. [TR. p. 445, Johnston par. 41.]

The effect of the "Opinion and Decision" of the Coast Arbitrator, Sam Kagel, was two-fold; the former official Pete Velasquez was severely damaged by his deregistration among other matters by loss of work and pension rights and plaintiff Local 13 and its members were further severely damaged by the effect of the

opinion and decision upon the ability of the Local to maintain its function as a Union and administer the Collective Bargaining Agreement. Defendant P.M.A. has and continues to use said opinion and decision to file and threaten to file complaints against officials of Local 13 and deregister them for activities carried on solely in their official capacities and while solely employed by the Union in administering the Collective Bargaining Agreement. Such attempted enforcement of the opinion and decision has the effect of harassing and coercing officials in carrying out their duties and the membership in their right to bargain collectively through officials of their own choosing and to have their rights protected. [TR. pp. 446-447, Johnston par. 44; TR. pp. 412-413, Leonard aff.]

Defendant P.M.A. has instructed the dispatchers that Pete Velasquez is not to be dispatched to any employment under the Pacific Coast Longshore Agreement and has therefore deregistered him. This has prevented Pete Velasquez from again running for office, has deprived him from his welfare, pension and mechanization fund rights, seniority rights, and from working for employers who filed no charges against him. The Pacific Coast Longshore Agreement is so extensive that it covers nearly all of the employment available to the members of plaintiff Local 13, therefore the deregistration of Pete Velasquez was tantamount to depriving him from all employment in the longshore industry. [TR. p. 446, Johnston par. 43; TR. pp. 394, 395 and 400, pars. 4, 14, 15, 16, 17, 18.]

After the decision of the Coast Arbitrator deregistering Pete Velasquez, The Area Arbitrator telephoned Curt Johnston and suggested that he try to negotiate a deal to see if Harry Bridges could have Velasquez reinstated and suggested that he might have to have some type of agreement that Velasquez would never

run for office again to help induce the employer to reinstate him. [TR. pp. 443, 444, Johnston par. 37.]

The decisions of the Area and Coast Arbitrators are set forth respectively as Appendix I and II of this brief and are also contained in the transcript on file. [TR. p. 87; TR. p. 103.]

3. Additional Background of Case.

The foregoing summary of the background is supported by the affidavits and evidence in much more extensive and detailed manner than set out above and includes additional factors. The more detailed evidence in support of plaintiff's complaints and assignment of errors is more fully set forth in respect to the arguments to which said evidence is applicable.

The foregoing is more particularly evident in respect to the connivance and conspiracy entered into between the defendants to procure the deregistration of Pete Velasquez and cause the damage previously set forth. The facts of said connivance and conspiracy being referred to under Point I of the argument hereafter set forth, and are set forth in Appendix VI herein with a summary of the ten (10) cases in which Velasquez was found guilty being set forth in Appendix V herein. Said cases being demonstrative of their relatively minor nature and the participation of the P.M.A. and the Area Arbitrator in bringing about the situations out of which the cases arose.

B. Procedural Steps.

Plaintiff's remedy under the grievance procedure was exhausted June 29, 1965, when the Coast Arbitrator handed down his opinion and decision and deregistered Pete Velasquez. [TR. p. 615, Court Finding No. 15.]

Plaintiff brought a petition in the State Court to set aside the opinion and decisions of both the Area and

Coast Arbitrators. The petition was filed September 1965, and alleged substantially the same facts as are contained in plaintiff's amended complaint. (Supplement to the Record.) [TR. pp. 65-109.] The petition was brought under California *Civil Code Section* 1286.2 which provides a remedy similar to that of the Federal Arbitration Act contained in *Title 9, Section 10 U.S.C.*

Each of the defendants filed separate petitions for removal to the United States District Court resulting in two District Court cases, to wit: 65-1414-S and 65-1420-S, before the Honorable Albert Lee Stephens, Jr., District Judge. A motion was made to consolidate the cases and the motion was granted and the cases were consolidated under the lower number 65-1414-S. [TR. p. 64.]

Defendant P.M.A. filed a motion to "Strike the Petition, to Strike Portions of Petition and to Dismiss the Petition for Want of Jurisdiction in any Court." Plaintiff filed an amended complaint which basically contained the same allegations set forth in the petition; however, in the amended complaint the allegations were set forth in two (2) causes of actions. [TR. pp. 65-76.] Thereafter, plaintiff P.M.A. filed a motion to Strike and Dismiss the Amended Complaint and Portions Thereof. [TR. pp. 115, 116.] The Honorable Albert Lee Stephens, Jr., District Judge, on March 15, 1966, denied the motion. [TR. p. 125.]

Defendant International filed its answer to the amended complaint. [TR. pp. 110, 111.] Defendant P.M.A. filed its answer to the amended complaint and filed a cross-complaint against defendant International Longshoremen's and Warehousemen's Union and an amended Counter-claim against Plaintiff Local 13 seeking to have the arbitration opinions and decisions confirmed by the Court. [TR. pp. 126-142.] Plaintiff Local 13 answered the Counter-claim setting forth defenses to

confirmation which were in substance similar to the matters set forth in plaintiff's amended complaint as grounds to have the opinions and decisions set aside. [TR. pp. 291-295.]

By order of Court filed July 5, 1966, the previously consolidated matters were transferred to the calendar of the Honorable A. Andrew Hauk, District Judge, redesignating the matters 65-1414-AAH and 65-1420-AAH. Interrogatories were submitted to plaintiff and answers were filed thereto. [TR. pp. 181-236.] Requests for admissions were made by defendant P.M.A. and directed to plaintiff. Plaintiff filed answers to the majority of the requests and objections to the remainder. [TR. pp. 238-256.]

A hearing was had upon the objections and said objections were sustained in part and overruled in part. [TR. pp. 262-263.] Plaintiff filed additional answers answering the requests for admissions to which the objections were overruled.

A pre-trial conference order was lodged with the court on April 4, 1967 [TR. pp. 297-329.] A motion for summary judgment was filed April 6, 1967 and set for hearing on April 17, 1967, at 10:00 a.m., before the Honorable A. Andrew Hauk, District Judge. The motion for summary judgment was filed jointly in one document by both defendants P.M.A. and International Union. Neither defendant filed documents or evidence in support of the motion (other than their memorandum); the motion was based on the memorandum of points and authorities filed with their notice of motion and motion, and upon the records, pleadings, papers

and documents previously filed in this action. [TR. pp. 330-331.]

Plaintiff Local 13 filed its memorandum in opposition to motion for summary judgment together with affidavits, transcripts and answers to interrogatories as follows:

Affidavit of Pete Velasquez, Exhibit 1.

Affidavit of Curt Johnston, Exhibit 2.

Affidavit of Sam Puccio, Exhibit 3.

Affidavit of Patrick Leonard, Exhibit 4.

Affidavit of Robert Carney, Exhibit 5.

Area Arbitration January 4, 1965, Transcript, Ex. 6-A.

Area Arbitration January 5, 1965, Transcript, Ex. 6-B.

Area Arbitration January 6, 1965, Transcript Ex. 6-C.

Coast Arbitration April 28, 1965, Transcript, Ex. 7.

Exhibits (1) through five (5), together with a copy of the opinions and decisions of both the Area and Coast Arbitrator are contained in the Transcript filed in the above matter, as are defendants' answers to the interrogatories.

The matter of the motion for summary judgment came on for hearing on April 17, 1967, with extensive argument on the part of Plaintiff. [TR. p. 451.] On April 25, 1967, the Court made an order for summary judgment in favor of defendants and directing the preparation of findings of fact, conclusions of law and summary judgment to be submitted to the Court within 30 days with 15 days' leave granted to plaintiff to object thereto. [TR. pp. 452-455.] Defendant P.M.A. submitted findings of fact, conclusions of law and a form

of summary judgment which was lodged with the lower Court. Plaintiff Local 13 filed its objections thereto, together with an eighty-seven (87) page memorandum in support of the objections. [TR. pp. 550-556; TR. pp. 458-549.]

The lower Court did not adopt or sign the findings of fact, conclusions of law or judgment submitted by defendant P.M.A. and prepared and filed on December 20, 1967, its own findings of fact, conclusions of law and judgment. [TR. pp. 606-692.] The plaintiff Local 13 thereafter on January 15, 1968, filed its notice of appeal from said judgment. [TR. pp. 698, 699.]

C. The Order for Summary Judgment.

The lower Court made its Findings of Fact and Conclusions and thereupon made its Order for Summary Judgment as follows [TR. p. 639]:

“ORDER

“By reason of the foregoing Decision, Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that judgment be entered herein granting summary judgment against plaintiff and in favor of defendants upon the amended complaint herein, dismissing said amended complaint on the merits and confirming and enforcing the Opinion and Decision of Sam Kagel, Coast Arbitrator, dated June 29, 1965.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 20, 1967.

/s/ A. Andrew Hauk
A. Andrew Hauk
United States District Judge”

III.

SPECIFICATIONS OF ERROR.

1. Plaintiff contends it was error for the District Court to grant summary judgment against plaintiff and in favor of defendants confirming and enforcing the opinion and decision of the Coast Arbitrator, Sam Kagel, and to dismiss plaintiff's complaint on the merits, in that said complaint set forth claims upon relief could be granted because:

(a) Grounds were alleged setting forth that the opinions and decisions of the arbitrators were contrary to public policy and the national labor policy.

(b) Grounds were alleged setting forth that decisions and opinions of the Arbitrators should be vacated and set aside under the grounds provided by the Arbitration Act, 9 U.S.C., Section 10, including therein the grounds of fraud, corruption, undue means, evident partiality by the arbitrators and that the arbitrators exceeded their powers.

(c) Grounds were alleged whereby the decisions and opinions of the arbitrators were a result of a connivance and conspiracy with defendants and violated the duty of fair representation owed by defendant to plaintiff's member, Pete Velasquez.

(d) The opinions and decisions of the arbitrators were a manifest disregard for both the law and the collective bargaining agreement.

(e) That competent facts were set forth and introduced as to each and all of the above matters set forth in subdivisions a, b, c, and d, hereof and the lower court erred in not finding and concluding upon the facts as follows:

(1) That the arbitrators decisions were a result of a connivance and conspiracy between the arbitrators and defendants.

(2) That the arbitrators decisions were obtained by undue means.

(3) That the arbitrators decisions were a result of fraud.

(4) That the arbitrators exceeded their powers and jurisdiction.

(5) That the arbitrators demonstrated evident partiality against defendant and defendants member, Pete Velasquez.

(6) The arbitrators decisions were a result of corruption on the part of the arbitrators.

(7) That the arbitrators opinions and decisions were against public policy and the national labor policy.

(8) That defendant International Union violated its duty of fair representation owed to defendant and defendants member, Pete Velasquez, and said violation was participated in by defendant P.M.A. as part of the connivance and conspiracy.

(9) Finding that the opinions and decisions of the arbitrators constituted a discharge for union activities and concluding that the opinions and decisions were violative of the provisions of Sections 7 and 8 (a) (1) of the Labor Relations Act.

(10) Finding that the arbitrators opinions and decisions were a means for the employer P.M.A. to dominate and coerce plaintiff, Local 13, and interfere with the administration of plaintiff local and deprive the membership of representation of its own choosing and has been so used by defendant P.M.A. and therefore concluding that the opinions and decisions of the arbitrators were violative of Sections 7 and 8 (a) and (1) and (2) of the Labor Management Relations Act.

(11) Finding that the arbitrators opinions and decisions constituted an award of damages against

a union official and therefore concluding that the opinions were violative of Section 301 of the Labor Management Relations Act.

(12) Finding that the arbitrators decisions were an unauthorized modification of the collective bargaining agreement contrary to the terms of Section 22.1 thereof, and concluding that the opinions were violative of Section 8 (d) (1), (2), and (3) of the Labor Management Relations Act.

(13) Finding that the arbitrators did not interpret the collective bargaining agreement as written.

(14) Finding that the arbitrators did not base their opinions and decisions upon facts as they applied to the collective bargaining agreement as written.

(15) Finding that the opinions and decisions of the arbitrators were not adequately grounded in the collective bargaining agreement.

(16) Finding that Section 17.81 of the collective bargaining agreement did not include and apply to union officials.

(17) Finding that the Area Arbitrator proceeded to arbitrate cases 5 through 12 ex-parte in violation of the collective bargaining agreement in excess of his powers and jurisdiction.

(18) Finding that the collective bargaining agreement was a trade agreement and that union officials were not employed thereunder and issues in respect to union officials were not arbitrable.

(19) That plaintiff, Local 13, did not consent to and refused to arbitrate cases 5 through 12.

(20) That the arbitrators opinions and decisions were arrived at by and with a manifest infidelity by the arbitrators to their obligations.

(21) That at the time of the alleged cases number 5 through 12 which appear in both the Area Arbitrator and Coast Arbitrators opinion and decision plaintiff's member, Pete Velasquez, was solely employed by plaintiff and was not performing any service or function under the Pacific Coast Longshore Agreement as an employee or otherwise.

(22) That plaintiff's member, Pete Velasquez, was damaged by the arbitrators opinions and decisions by loss of, seniority, employment, pension rights, welfare rights and loss of payment present and future from the ILWU-PMA Mechanization fund.

(f) The lower court erred in not concluding upon the foregoing facts that plaintiff was entitled to judgment setting aside the opinions and decisions of the Area and Coast Arbitrator.

2. The lower Court further erred in its findings and conclusions as hereinafter set forth, the findings complained of being contrary to fact as introduced in opposition to the motion for summary judgment and the conclusions complained of being both contrary to fact and law.

(a) The lower court erred in its conclusions number II which provided as follows:

"The award of the Coast Arbitrator, the award of the Area Arbitrator, as well as the decisions rendered throughout all stages of the grievance machinery were and are in complete accordance with the terms of the collective bargaining agreement between employer and union, "Pacific Coast Longshore Agreement, 1961-1966," particularly the terms governing the grievance-arbitration procedure.

Each award and decision, “reached after proceeding adequate under the agreement, is final and binding upon the parties, just as the contract says it is.” *Humphrey v. Moore*, 375 U.S. 335, 351 (1964) relying upon *Drivers Union v. Rose & Co.*, 372 U.S. 517, 519 (1963).

(b) The lower court erred in its conclusion number III which is basically a four (4) page repetition of conclusion number II with the additional erroneous provisions as follows:

“Nowhere in the record can we find any support for plaintiff’s attack upon the integrity of the ILWU and of the procedures which led to the Coast Arbitrator’s award and the Area Arbitrator’s award, * * * Nowhere is there a factual statement, claim or allegation of fraud, deceitful action or dishonest conduct.”

“The record does show that the ILWU fought on behalf of Velasquez and Local 13 against PMA in the five steps of the grievance procedure vigorously and at times even vituperatively, but always valorously and valiantly.”

(c) The lower court erred in its fourteen page conclusion number IV and all the subdivisions thereof, said conclusion basically providing:

“The ILWU did not breach its duty of fair representation.”

(d) The lower court erred in its conclusion number V which provides as follows:

“There is no genuine issue as to any fact material to the amended complaint herein. The amended complaint and each and every cause of action therein alleged fails to state a claim upon which relief can be granted. Plaintiff is not entitled to any relief under or by virtue to any order or judg-

ment setting aside or vacating the Coast Arbitrator's award dated June 29, 1965, or the Area Arbitrator's award dated February 13, 1965, or either of them."

(e) The lower court erred in its conclusion number VI which provides as follows:

"There is no genuine issue as to any fact material to the cross-claim and counter-claim. Defendant, Cross-Claimant and Counter-Claimant Pacific Maritime Association is entitled to relief under and by virtue of the cross-claim and counter-claim and, in particular, is entitled to an order and judgment confirming and enforcing the Coast Arbitrator's award dated June 29, 1963."

(f) The lower court erred in its finding numbered 19 which provides as follows:

"The allegations contained in Local 13's amended complaint, to the extent that they are inconsistent with the findings of fact herein, are untrue."

(g) The lower court erred in finding and concluding that the opinions and decisions of the Area and Coast Arbitrators were final and binding and not subject to being set aside.

3. The lower court erred in not considering the evidentiary matters introduced in the light most favorable to the plaintiff.

4. The lower court erred in not determining whether there was a triable issue of fact and upon such determination ordering and having a trial on said issues.

5. The lower court erred in finding upon and deciding facts where there were triable issues of fact.

6. The lower court erred in both finding and concluding both contrary to the law and facts as set forth herein in finding number 19, and finding number 18,

to the extent that the facts are not fully found or in the light most favorable to plaintiff, and in its conclusions number II, III, IV, V, and VI in their entirety.

7. The lower court erred in its finding number 18 and the subdivisions thereof, save and except subdivisions I and K. Said error being to the extent that said findings are not full and complete and found in the light most favorable to plaintiff.

8. The lower court erred in ordering summary judgment against appellant and in favor of appellees and in dismissing appellant's amended complaint and enforcing and confirming the opinion and decision of the Coast Arbitrator.

IV.

ARGUMENT.

A. Plaintiff Was Entitled to Relief Under the Arbitration Act 9 U.S.C. Section 10 and the Lower Court Erred in Not so Finding and in Concluding to the Contrary.

The present case arises out of arbitration proceedings had at the instance of the defendant P.M.A. and brought against plaintiff Local 13. Plaintiff arbitrated, before the Area Arbitrator, four (4) complaints involving a member of plaintiff Local 13 who was also a former official of plaintiff Local 13. The four (4) complaints arbitrated by plaintiff involved activities of Pete Velasquez as a union member employed as a longshoreman and working under the Collective Bargaining Agreement which is commonly referred to as the "Pacific Coast Longshore Agreement."

Plaintiff refused to arbitrate the remaining eight (8) complaints on the grounds that to arbitrate such cases was contrary to both Federal and State law and beyond the jurisdiction of the arbitrator and that Sec-

tion 17.81 of the Collective Bargaining Agreement did not apply to union officials. [TR. pp. 439, 440, Johnston pars. 25, 26, 27.] The remaining eight (8) complaints involved alleged activities of Pete Velasquez at a time when he was employed solely by plaintiff as an official of plaintiff Local 13 and serving in such capacity. However, defendant P.M.A. proceeded to arbitrate the remaining eight (8) complaints ex parte. [Finding No. 12, TR. p. 614; TR. p. 440, Johnston par. 9] (Appendix I, p. 2.)

After the close of the ex parte arbitration, the Area Arbitrator, Germain Bulcke, rendered an opinion and decision embodying all twelve (12) complaints. The opinion and decision is attached to plaintiff's complaint as Exhibit "D", is appended to the lower Court's judgment as "Appendix II" and is attached to this brief as "Appendix I". The opinion and decision of the Area Arbitrator found Velasquez guilty in ten (10) of the twelve (12) complaints filed against him. Two of the complaints for which Velasquez was found guilty concerned the "SS PRESIDENT QUEZON" and the SS MICHIGAN", these two (2) complaints involved Velasquez as a union member working under the Collective Bargaining Agreement and are set forth in the previous summary herein. The remaining eight (8) complaints for which Velasquez was found guilty involved activities of Velasquez which, if they transpired, were activities carried out when Velasquez was solely employed as a union official and carrying out his duties as an official of plaintiff Local 13. [Finding No. 12, TR. p. 614.] (Arbitrator's Opinion and Decision Appendix I herein.) In respect to the remaining eight (8) cases Velasquez was not employed in any manner as a longshoreman or under the Collective Bargaining Agreement [TR. pp. 434, 435, Johnston par. 11.]

Section 17.261, page 67 of the Collective Bargaining Agreement provided as follows [TR. p. 53]:

“17.261 Any decision of a Joint Port of Joint Area Labor Relations Committee or of an Area Arbitrator claimed by either party to conflict with this Agreement shall immediately be referred at the request of such party to the Joint Coast Labor Relations Committee (and, *if the Joint Coast Labor Relations Committee cannot agree, to the Coast Arbitrator, for review*). * * *” (Emphasis added.)

The matter of the Area Arbitrator’s Opinion and Decision was then referred to the Joint Coast Labor Relations Committee which did not agree on the matter and referred the matter for review before the Coast Arbitrator, Sam Kagel, which was the final step in the grievance procedure. [Finding No. 15, TR. p. 615.] The Coast Arbitrator on review rendered his Opinion and Decision and deregistered Pete Velasquez from all employment under the Collective Bargaining Agreement basing the deregistration on the complaints arising both out of his employment as a working longshoreman and his employment solely as a union official. The award of the Coast Arbitrator is attached to plaintiff’s complaint as Exhibit “E” and appended to the judgment of the lower Court as “Appendix I” and is included in this brief as “Appendix II”.

Section 17.15 of the Collective Bargaining Agreement provided [TR. p. 615]:

“No other remedies shall be utilized by any person with respect to any dispute involving this agreement *until the grievance procedure has been exhausted*.” (Emphasis added.)

After plaintiff had exhausted its remedy under the grievance procedure, plaintiff filed a Petition in the State Court to set aside the opinions and decisions of the Area and Coast Arbitrators and the Petition was

removed to the District Court and was before the Court on the amended complaint at the time of the granting of the Summary Judgment which is appealed from herein.

The *Arbitration Act, 9 U.S.C. Section 10*, sets forth the grounds upon which an arbitration award may be vacated. Subdivision a., b., and d. of Section 10 provide grounds as follows:

“(a) Where the award is procured by corruption, fraud, or undue means.

“(b) Where there was evident partiality or corruption, in the arbitrators or either of them.

“(d) Where the arbitrators exceed their powers,
* * *”

The above grounds of *Title 9, Section 10* for the vacating of the arbitration award were set forth in plaintiff's complaint. [Pars. XXI-XXII, TR. pp. 72, 73.] However, the lower Court made no specific findings in respect to such ground except that the Court found that, “The award manifestly disregards the Collective Bargaining Agreement and the law” [Finding No. 18K, TR. p. 618] and further found that:

“The allegations contained in LOCAL 13's amended complaint, to the extent that they are inconsistent with the Findings of Fact herein are untrue.” [Finding No. 19, TR. pp. 618, 619.]

In the case of *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912 in deciding the issue as to the substantive law to be applied to effectuate Section 301 of the *Labor Management Relations Act*, at pages 455 and 456, the Court in referring to the legislative history of the Section and its former equivalent, Section 302, set forth:

“‘It is my understanding that Section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and

proceedings in district courts contemplates not only the ordinary law suits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances, in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.

“ ‘Mr. Hartley. The interpretation the gentleman has just given of that section is absolutely correct.’ 93 Cong. Rec. 2646-2656.” (Emphasis added.)

The Supreme Court in affirming the decision, in *General Electric Company v. Local 205 United Electrical, Radio and Machine Workers of America*, 353 U.S. 547, 77 S. Ct. 921, at page 548 stated:

“* * * It then held that while Sec. 301 (a) of the Labor Management Relations Act of 1957, 29 USCA, Sec. 185 (a) gave the District Court jurisdiction of the cause, it supplied no body of substantive law to enforce an arbitration agreement governing grievances. But it found such a basis in the *United States Arbitration Act*, which it held *applicable to these collective bargaining agreements*.” (Emphasis added.)

In the case of *Metal Products Workers Union, Local 1645 v. The Torrington Company*, (D. Conn. 1965) 242 F. Supp. 813, affirmed (2nd Cir. 1966) 358 F. 2d 103. The Union filed its petition to set aside the award and the employer contended that the court lacked jurisdiction. The Court in holding that it had jurisdiction and could grant relief under the *Arbitration Act*, 9 USCA, stated at page 819:

“* * * Although the Arbitration Act itself confers no jurisdiction upon this Court, ‘it does provide an additional procedure and remedy in the Federal Courts where jurisdiction already exists’ * * *.”

Where a court has authority to make an order for arbitration it has the authority to confirm the award or set it aside for irregularity, fraud or other defects. *Marine Transit Corporation v. Drefus*, (1932) 284 U.S. 263, 52 S. Ct. 1966. Further it is proper to seek relief from an arbitration award regarding a collective bargaining agreement by complaint as required by the *Labor Management Relations Act*, basing the complaint on the grounds for relief set forth in the *Arbitration Act. Engineer's Ass'n. v. Sperry Gyroscope Co., Etc.*, 251 F. 2d 133.

Though the lower Court never further specifically found in respect to the above grounds it in substance concluded in its Conclusion No. III [TR. pp. 619-624] that the doctrines of the cases of *Humphrey v. Moore*, 375 U.S. 335; *Ford Motor Company v. Huffman*, 345 U.S. 330 and *Vaca v. Sipes*, 386 U.S. 171, provided the only form of remedy under which plaintiff could obtain relief. Plaintiff's relief thereby being restricted to relief granted when a union breaches its "statutory duty of fair representation toward a member" which breach "occurs only 'when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.'" Similarly the court concluded in its Conclusion No. IV K that the powers of the Court and plaintiff's recovery was limited by the cases cited therein. [TR. pp. 633-638 at 638.] Each of these conclusions were in error as being contrary to both the law and facts.

Defendant P.M.A. chose its forum, which was arbitration, and chose its adversary, which was plaintiff Local 13, the defendant International Union, was not a party to the arbitration. (Appendix I Area Arbitration Award.) [Ex. 6A. B., and C, Transcript of Arbitration.]

Plaintiff was before the lower Court fulfilling its duty to its membership as required by law and to do

so does not have to allege or prove any facts which a member might have to prove if plaintiff had not filed its action in the lower Court.

The duty of plaintiff has been recently set forth in the case of *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 192, where the Court allowed a union to sue in the United States District Court under Section 301 of the *Labor Management Relations Act* to recover wages and vacation pay on behalf of various members even though the union did not have an assignment of the claims. In recognizing that each employee's claim may rest on the existence of his individual contract of employment the Court at page 700 stated:

“‘Any * * * labor organization may sue * * * in behalf of the employees whom it represents in the courts of the United States.’ * * * And indeed, the unions standing to vindicate employee rights under Sec. 301 implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract.”

Arbitration is merely a form of trial *American Locomotive Co. v. Chemical Research Corporation*, (6th Cir. 1949) 171 F. 2d 115, 120; *Hyman, et al. v. Rothberg Ex's et al.*, (2nd Cir. 1939) 101 F. 2d 262, 265. However, an arbitration award which was made is binding and authoritatively creates rights by becoming part of the Collective Bargaining Agreement, unless the arbitration award is set aside. *Albin Stevedore Company v. Central Rigging and Contracting Corporation*, (9th Cir. 1962) 308 F. 2d 347.

Plaintiff is now before this Honorable Court as an adverse party to the arbitration conducted at the request of defendant P.M.A. and the only other party to such

proceedings. Plaintiff has pleaded two separate causes of action to set aside the arbitration award and is entitled to the remedies provided by the *Arbitration Act* 9 U.S.C. Sec. 10 to set aside or vacate arbitration awards. Said remedies are not to be confused with other and additional remedies given to a union member by cases such as *Humphrey v. Moore, supra*, or *Vaca v. Sipes, supra*, such additional remedies exist when a member's local fails or refuses to represent the member in good faith or actually represents the member in bad faith.

The present case has two separate facets in that the member and former union official who was deregistered has been damaged by the Opinions and Decisions of the arbitrators and plaintiff, Local 13, has also been further and grievously damaged by the opinions and decisions. This damage has been pleaded [pars. XIX, XXI, XXII, plaintiff's first cause TR. pp. 72, 73; pars. VI and VII, plaintiff's second cause TR. pp. 75, 76.] Said damage was fully proved and is set forth in Points D-3, D-4 and D-5 of this brief.

The further and more complete reasons as to why it was not necessary that plaintiff plead or prove "arbitrary, discriminatory or bad faith conduct" by a union against a member are set forth in Point "B" of this brief as are the reasons why plaintiff can avail himself as such pleadings of "arbitrary, discriminatory or bad faith conduct" which do exist. In this same regard the pleading of such arbitrary, discriminatory and bad faith conduct and the facts which compel judgment in favor of plaintiff as a result of such conduct are set forth in Point I of this brief.

The lower Court committed grievous error in making its Finding Number 19 and its Conclusions numbered III and IV and in thereby denying plaintiff the

relief to which plaintiff was entitled under the grounds set forth in the *Arbitration Act* and the application of the law to which plaintiff was entitled. That by reason of each of such errors the judgment of the lower Court should be reversed in its entirety.

B. The Doctrines of *Humphrey v. Moore* and *Vaca v. Sipes*, Are Not, as Urged by the Lower Court, Applicable in the Present Case, Except as to the Rights of the Member Under the Allegation of a Connivance and Conspiracy. And the Lower Court Erred in so Finding and Concluding.

The lower Court held the doctrines of *Humphrey v. Moore*, *supra*, 375 U.S. 335; *Ford Motor Co. v. Huffman*, 345 U.S. 330, and *Vaca v. Sipes*, 386 U.S. 171 to be applicable in the present case and that under facts found by the Court concluded that plaintiff should be denied recovery and that judgment should be rendered in favor of defendants. [Conclusion No. III, TR. pp. 619-624; Conclusion No. IV, TR. pp. 624-636.]

For the reasons previously set forth in Point “A” of this brief and the matters hereinafter set forth, it was not necessary to either plead or prove a “breach of the statutory duty of fair representation” or “arbitrary, discriminatory, or bad faith conduct” towards a member of the bargaining unit by the Union, as set forth by the lower Court from the cases of *Humphrey v. Moore*, *supra*, *Ford Motor Co. v. Huffman*, *supra*, and *Vaca v. Sipes*, *supra*.

The lower Court erred in that it commenced and continued with a nonexistent premise and failed to distinguish between factual situations. The lower Court assumed and in substance and effect asserted that the *Humphrey v. Moore* doctrine, *supra*, is a necessary ele-

ment to the setting aside of the arbitration decisions and opinions *and the exclusive ground upon which plaintiff must seek relief*. From the factual circumstances which exist and law applicable a "breach of the statutory duty of fair representation" or "arbitration discriminatory or bad faith conduct" are not necessary elements which plaintiff was required to either plead or prove. The case of *Humphrey v. Moore* does not involve the setting aside of an arbitration award by a participant or purport to abolish the statutory or other grounds for setting aside an arbitration award. *Humphrey v. Moore* is only an additional manner in which a member can obtain relief and which is applicable where his union in bad faith fails to seek the relief for him. The alleged doctrine is not a necessary element for the union itself to seek the relief.

The Court in the case of *Vaca v. Sipes*, 386 U.S. 171, at page 177 stated:

"* * * The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the *Railway Labor Act*, see *Steel v. Louisville & N.R. Co.*, 323 U.S. 192; *Tunstall vs. Brotherhood of Locomotive Firemen*, 323 U.S. 210, and was soon extended to unions certified under the N.L.R.A., see *Ford Motor Co. v. Huffman*, *supra*."

The answer to the lower Court's contentions in respect to its citation of the case of *Humphrey v. Moore*, *supra*, and the proposition for which the Court held it to stand is found in the reading of the case itself, which by the logic of the concurring opinion of Justices Goldberg and Brennan shows the case to have no application in respect to the relief sought by plaintiff

under the *Arbitration Act*. In the case of *Humphrey v. Moore, supra*, at pages 355 and 356, the Court stated:

“* * * I read the decisions of this Court to hold that an individual employee has a right to a remedy against a union breaching its duty of fair representation—a *duty derived not from the collective bargaining contract but implied from the union’s rights and responsibilities conferred by federal labor statutes* * * *” (Emphasis added.)

In the same respect: *Vaca v. Sipes, supra*, at page 177.

In similar regard the case of *Woody v. Sterling Aluminum Products, Inc.*, (1965) 243 F. Supp. 755, 765, set forth:

“‘The right to arbitrate under a collective agreement is not ordinarily a right incident to the employer-employee relationship, *but one which is incident to the relationship between employer and union.*’ Proctor and Gamble Independent Union v. Proctor & Gamble Manufacturing Company, 2 Cir., 312 F.2d 181, 1 c. 185, Carey v. General Electric Company, 2 Cir., 315 F.2d 499.” (Emphasis added.)

The relief which plaintiff sought in the lower Court was a right to relief derived from the Collective Bargaining Contract which arose out of employer-union relationship and which was predicated on an arbitration instituted by the employer against the plaintiff union. The suit brought by plaintiff in the lower Court was a suit brought by a union not by an employee member to enforce rights which the union had denied him.

The case of *Vaca v. Sipes, supra*, involved a refusal by the union to take a member’s complaint to arbitration, pages 175, 176. In *Humphrey v. Moore, supra*, page 341, the issue was not arbitrable and in *Ford*

Motor Co. v. Huffman, the issue of arbitration was not involved. From the above cases it is clear that when a union, as plaintiff Local 13, has done in the present case, has proceeded in good faith to protect its own rights and at the same time the rights of one of its members, the alleged doctrine of *Humphrey v. Moore* is not a necessary element to plaintiff's recovery. Plaintiff is before the Court fulfilling its duty as required by law and to do so does not have to allege or prove any facts which a member might have to allege or prove if plaintiff had not filed its present action.

In the present case the arbitration was invoked by defendant P.M.A. who allegedly invoked a right to arbitrate under the Collective Bargaining Agreement and invoked the alleged right against plaintiff Local 13. (Appendix I.) [Exs. 6A, 6B and 6C.] This alleged right was invoked by defendant P.M.A. against plaintiff Local 13 by reason of the existent employer and union relationship as set forth in *Woody v. Sterling Aluminum Products, Inc.*, *supra*, and not by reason of the union's responsibilities of fair representation owed to its members as set forth in *Humphrey v. Moore*, *supra*, which is a right of remedy of the member against the union.

In the present action defendant P.M.A. by cross and counter claims sought to have the arbitrations, opinions and decisions confirmed. The Court affirmed the opinions and decisions of the arbitrators and in so doing erred. Where the Court has the power to confirm an award it has the power to set it aside. The power to set the award aside was not limited to or affected by the doctrines of the *Humphrey* and *Vaca* cases, *supra*, but included the powers set forth in Point A, and subsequent points of this brief and which the lower Court failed to consider or find upon other than to find: "That the award manifestly disregards the Collective Bargaining Agreement and the law." [Find-

ings No. 18K. TR. p. 618.] However, due to the peculiar facts of the present case plaintiff, as is set forth in Point I hereof, was also entitled, on behalf of its member, Pete Velasquez, to any further relief pleaded and proved under the doctrines of the *Humphrey* and *Vaca* cases, *supra*.

C. The Collective Bargaining Agreement Was a "Trade Agreement" and Cases 5 Through 12 Were Not Arbitrable as There Was No Existing Arbitration Agreement Under Which They Could Be Arbitrated.

The Area Arbitrator arbitrated complaints five (5) through twelve (12) ex parte, after plaintiff refused to participate in an arbitration of such complaints. [Finding No. 12, TR. p. 614.] Complaints five (5) through twelve (12) were each complaints which allegedly arose out of activities of Pete Velasquez in administering the Collective Bargaining Agreement under the directions of the membership and senior officials and at a time when he was solely employed by Local 13, was not employed as a longshoreman and was not performing any function under the Collective Bargaining Agreement. [TR. p. 395, Velasquez par. 5; TR. pp. 434, 435, Johnston par. 11; TR. p. 9, Johnston par. 25.]

As is clearly shown in page eight (8) through fifteen (15) of the Area Arbitrator's opinion and decision (Appendix I) defendant P.M.A. brought complaints five (5) through twelve (12) against Pete Velasquez in his capacity as an official of plaintiff Local 13, to wit, "business agent" and that the Area Arbitrator found the activities complained of to have been carried on by Pete Velasquez as the union's Business Agent. In similar regard the Coast Arbitrator deregistered Pete Velasquez for the activities which he allegedly carried out as the union's Business Agent. (Appendix II.)

Likewise the opinion and decision of the Area Arbitrator clearly showed that the arbitration was *ex parte*. [TR. p. 94.]

Prior to the arbitration of complaints five (5) through twelve (12) plaintiff Local 13 had refused to arbitrate said complaints on the ground that to arbitrate said complaints was against State and Federal laws, the arbitrator was without jurisdiction and Section 17.81 of the Agreement did not apply to union officials. [Ex. 6A pp. 124, 125, 127; Ex. 6B, p. 174; TR. pp. 439, 440, Johnston pars. 25, 26, 27.] The position of plaintiff was correct as to said complaints, there was no arbitrable issue as said complaints did not and could not arise under the Collective Bargaining Agreement and the Area Arbitrator lacked jurisdiction to predicate a penalty of deregistration or any other penalty on such cases.

In *MacKay v. Lowe's Inc.*, 182 F. 2d 170, 172 (9th Cir. 1950) in construing the effect of a collective bargaining agreement the court stated:

"A collective bargaining agreement is *not a contract of employment*. Rather it is an agreement between the union and employer laying down certain conditions of employment which, it is contemplated, are to be incorporated in the separate contracts of hiring with each employee. * * *" (Emphasis added.)

In *N.L.R.B. v. Wooster Division of Borg-Warner Corporation*, (6th Cir. 1956) 236 F. 2d 898, 904, 905, the court stated:

"* * * *The collective bargaining contract is not the contract of employment. It is rather the trade agreement* which controls the individual contracts of employment. *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762." (Emphasis added.)

The fact that each worker's claim is based upon an individual contract of employment was again recently recognized in *International Union v. Hoosier Cardinal Corp.*, *supra*, 383 U.S. 696.

The Pacific Coast Longshore Agreement not being a contract of employment and merely being a "trade agreement" could not have an effect upon anyone not employed thereunder and could not therefore include Union officials under Section 17.81 thereof. Local 13's officials are not employed under the Pacific Coast Longshore Agreement, the severance is full and complete and must be as a matter of law, for they do not perform any function for or on behalf of the employer and therefore do not and cannot receive remuneration from the employer as the receipt of same would be a violation of Section 8(a) (2) of the Labor Management Relations Act which prohibits an employer from "contributing financial or other support to" a labor organization.

Local 13 was correct in refusing to arbitrate cases numbered 5 through 12 for an issue regarding one not employed under the Pacific Coast Longshore Agreement, such as a union official, is not arbitrable. Arbitrability is for the court to decide, not the arbitrator and one cannot be forced to arbitrate that which he did not agree to arbitrate.

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 82 S. Ct. 1318 (1962);

John Wiley and Sons, Inc., v. Livingston, 376 U.S. 543, 546, 84 S. Ct. 909.

The arbitration opinion and decision of the Area Arbitrator was void for the inclusion therein and the arbitration of cases five (5) through twelve (12) as is the opinion and decision of the Coast Arbitrator as having been made and based upon the Area Arbitrator's opinion and decision as to cases five (5) through twelve (12). The lower Court erred in not considering the issue of either the power or jurisdiction of the Area or Coast Arbitrator or making specific findings or conclusions thereon and in not finding and concluding that the opinions and decisions of the Area and Coast Arbitrators were beyond their power and jurisdiction and should be set aside. The closest finding of the Court in this respect was: "That the award manifestly disregards the collective bargaining agreement and the law." [Finding 18 K, TR. p. 618.]

The acts of the Area Arbitrator in arbitrating cases five (5) through twelve (12) were clearly in excess of his powers as was the act of the Coast Arbitrator in deregistering the former union official, Pete Velasquez, based upon cases five (5) through twelve (12). The *Arbitration Act*, 9 U.S.C. Section 10 Subdivision "d", provided the remedy of setting the award aside "*Where the arbitrators exceed their powers.*" The lower Court erred in both not considering and in not granting the relief provided by the *Arbitration Act*.

In similar respect, plaintiff, Local 13, could not have gone to arbitration to attempt to discharge the president or any of the officers of the defendant P.M.A., as their employment is not covered by or paid for under the "*trade agreement.*" Such an attempted arbitration or discharge would be absurd; likewise, the attempted arbitration and deregistration of Pete Velasquez for alleged acts occurring while he was an official of and solely employed by plaintiff, Local 13, is equally absurd and void; such a proposal lacks all mutuality.

D. An Arbitration Award Which Is Violative of the Labor Management Relations Act or Thwarts Its Intent or Purpose Is Void, and the Lower Court Erred in Not Setting the Opinions and Decisions of the Arbitrators Aside as a Manifest Disregard of the Law, the Award Being in Violation of Sections 7, 8, and 301 of the Act.

The lower Court found: "That the award manifestly disregards the Collective Bargaining Agreement and the law." [TR. p. 618, Finding 18 K.] However, the lower Court continued by concluding:

"The Claim that the award is in manifest disregard of the Collective Bargaining Agreement and the law does not raise any breach of the ILWU's duty of fair representation." [TR. p. 636, Conclusion IV K.]

The lower Court erred in its Conclusion No. IV and IV K and in doing so continued to proceed upon an improper premise. The improper premise being that the only way which plaintiff could prevail was by raising a breach of the ILWU's duty of fair representation.

Any arbitration decision which by its terms or effect is violative of a federal law and tends to thwart the purpose of the law is invalid and may be set aside under the *Federal Arbitration Act*, 9 U.S.C., Sec. 10. In *Wilco v. Swan*, (2nd Cir. 1952) 201 F. 2d 439, 444, 445, the court set forth that failure to decide in accordance with the Securities Act constituted grounds for vacating the award under Section 10 of the *Arbitration Act*. In *Evans, v. Hudson Coal Co.*, (3rd Cir. 1947) 165 F. 2d 970 which was between the mine-workers and operators the court held that if the arbitration proceeded to an award which is not in accordance with the provision of the "Fair Labor Stand-

ards Act or any other applicable statute” (Emphasis added.) that Section 10 of the *Arbitration Act* provided means for vacating the award.

In similar respect in *Watkins v. Hudson Coal Co.*, (3rd Cir. 1945) 151 F. 2d 11 where it was urged that the contract entered into between the Company and Union bargaining agent was illegal and void as against public policy and contrary to the Fair Labor Standards Act, the court found the provisions of the agreement which were contrary to be invalid. In the same regard the court in *Red Star Exp. Lines v. N.L.R.B.*, (2nd Cir. 1952) 196 F. 2d 78 found the Union Security provisions of the Collective Bargaining Agreement illegal as violative of the *Labor Management Relations Act*, 29 U.S.C.A., Sec. 158 (a) (3), and enforced the Board’s order in respect thereto. In similar respect in the case of *N.L.R.B. v. American Rolling Mill Co.*, (6th Cir. 1942) 126 F. 2d 38, 41, the court found the Collective Bargaining Agreement violative of 29 U.S.C.A., Sec. 158 as having coercive effect in respect to membership and terminated the provisions thereof. See also *N.L.R.B. v. News Syndicate Company*, (1961) 365 U.S. 695, 700, 81 S. Ct. 849, 852.

It was decided in *Wilco v. Swan*, 346 U.S. 427, 436, 74 S. Ct. 182 (1953), that a manifest disregard for the law was subject to judicial review and a ground for setting an award aside. In the latter case of *Saxie Steamship Co. v. Multifacs International Traders Inc.*, (2nd Cir. 1967) 375 F. 2d 577, 582, the rule was again enunciated with somewhat different emphasis, the Court at page 582 stated:

“In addition to the specific proscriptions of 9 USC. Sec. 10, the Supreme Court has held in *Wilco v. Swan*, supra, 346 U.S. 436, 440, 74 S.Ct. 182, that an award based on ‘manifest disregard’ of the law will not be enforced; but this

presupposes 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.' *San Martine Compania de Navegacion v. Saguenay Terminals Ltd.*, supra, 293 F.2d at 801. See also *Amicizia Societa Navegazione v. Chilian Nitrate and Iodine Sales Corp.* supra, 274 F.2d 808."

The provisions of the Labor Management Relations Act as amended must be read as part of every collective bargaining agreement and the collective bargaining agreement should be read to include the terms of the act therein.

N.L.R.B. v. News Syndicate Company, (1961)
365 U.S. 695, 700;

Pacific Tel. & Tel. Co. v. Communication Workers of America, (D. Ore. 1961) 199 F. Supp. 689, 692;

Manseau v. United States, (Ed. Mich. S.D. 1943) 52 F. Supp. 395, 396;

Flores v. Barman, 130 Cal. App. 2d 282, 279 P. 2d 81.

An arbitration award must interpret the Collective Bargaining Agreement in conformity with the Labor Management Relations Act and the award must be in conformity with the Act. An arbitration award which ignores the provisions of the Act or which thwarts or subverts the Act or its intent evidences a manifest disregard for the law and must be set aside.

The opinions and decisions of the arbitrators which by their terms included union officials in the application, interpretation and effect of Section 17.81 of the Collective Bargaining Agreement are void. Section 17.81 of the Collective Bargaining Agreement provides in part:

“17.81 All longshoremen shall perform their work conscientiously and with sobriety and with due regard to their own interests shall not disregard the interests of the employer. *Any employee* who is guilty of deliberate bad conduct in connection with his work *as a longshoreman* or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offense, cancelled from registration. * * *” (Emphasis added.)

Section 1.71 of the Agreement provides:

“1.71 The term ‘longshoreman’ as used herein shall mean any man *working under this Agreement.*” (Emphasis added.)

Section 17.52 of the Agreement provides in part:

“17.52 Powers of arbitrators shall be limited strictly to the application and interpretation of the agreement as written. * * *”

The arbitrators failed to read into or consider the *Labor Management Relations Act* and its prohibitions and restrictions in interpreting the Collective Bargaining Agreement and wrongfully included union officials in the effect of Section 17.81 rendering their decisions void as being contrary to and in conflict with the provisions of Sections 7 and 8(a) (1) and (2) and Section 301 of the Act (29 U.S.C. Sections 157, 158, and 185). The arbitrators further applied the provisions of Section 17.81 to union officials contrary to the express terms of the Collective Bargaining Agreement and the restricted powers of the arbitrators as set forth in the Agreement which precluded such an interpretation. Clearly the arbitrators evidenced, as the Court found, a manifest disregard for the law and the Collective Bargaining Agreement. The facts of such disregard being

hereinafter more fully set forth in subsequent points D-1, D-2, D-3, D-4 and D-5 hereof.

In similar respect the lower Court erred in its Conclusion numbered II [TR. p. 619] when it concluded that the arbitrator's decisions and awards "were and are in complete accordance with the terms of the Collective Bargaining Agreement." This conclusion is in direct conflict with Finding 18 K, which provides "That the award manifestly disregards the Collective Bargaining Agreement and the law." The conclusion is also contrary to the law and facts as hereinbefore and hereinafter set forth for a manifest disregard for the law and the Collective Bargaining Agreement requires the conclusion the arbitrators' awards are in excess of their powers and should be set aside.

D-1. The District Court Has the Duty to Set Aside an Arbitration Award Which Is Violative of the Law as Constituting or Furthering an Unfair Labor Practice.

The legislature gave the right to the United States District Courts to compel and set aside arbitration awards; the right is not altered by the fact that the claimed grievance is also an unfair labor practice.

In *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912 in holding that the United States District Court had the right to compel arbitration and in speaking of the National Labor Relations Act, the Court at page 452 stated:

"The bills as they passed the House and Senate, contained provisions which would have made the failure to arbitrate an unfair labor practice. * * * This feature of the law was dropped in conference. As the Conference Report stated, 'Once parties

have made a collective contract, the enforcement of that contract should be left to the usual processes of law *and not to the National Labor Relations Board.*' ” (Emphasis added.)

In the latter but similar case of *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 84 S. Ct. 401 in upholding the right to compel the arbitration though the dispute could also involve an unfair labor practice at page 268, the Court stated:

“* * * But the existence of a remedy before the Board for an unfair labor practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in *Smith v. Evening News Assn.*, 371 U.S. 198, 83 S.Ct. 267, 9 L.Ed. 2d 246. We think the same policy considerations are applicable here. * * *”

In *Textile Workers Union of America v. Cone Mills Corp.*, 188 F. Supp. 626, affirmed (4th Cir. 1961), 290 F. 2d 921, the matter of affirming or vacation an arbitration award was summed up and the Court stated:

“The question for determination is whether the award should be affirmed and enforced, or should be vacated and set aside as invalid. In making this determination, we are directed to apply *federal substantive law* ‘fashioned from the policy of our national labor law.’ * * *” (Emphasis added.)

It is clear from the cases and legislative history of Section 301 of the *Labor Management Relations Act* that District Courts have the power and duty to set aside an arbitration award when the decision is contrary to the National Labor Policy which stems from the *Labor Management Relations Act* and includes decisions and awards which are violative of Section 8(a)

(1) and (2) of the Act or any other provision thereof regardless of whether or not the violation is also an unfair labor practice, as was stated in *Sidney Wanger and Sons, Inc. v. Milk Drivers Union Local 753*, (1966) 249 F. Supp. 664, 671. "Remedies under Section 301 must be tailored to the problems which they are invoked to solve" and as was stated in *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456, "the Act would be undercut and the policy defeated if the Act were given a narrow reading."

The remedy to be tailored in the present case was for the lower Court to set the arbitrators' decisions and opinions aside and the lower Court erred in not doing so and in affirming the decisions and opinions. The lower Court erred in not finding and concluding that the arbitrators' decisions were contrary to the *Labor Management Relations Act*, but correctly found in finding number 14 K [TR. p. 618] that the awards were a manifest disregard for the law and the Collective Bargaining Agreement.

D-2. The Opinions and Decisions of the Arbitrators Were Void and a Manifest Disregard for the Law, Constituting a Discharge for Union Activities in Violation of Sections 7 and 8 (a) (1) of the Labor Management Relations Act, 29 U.S.C., Sections 157 and 158 and Should Have Been Set Aside by the Lower Court.

The opinion and decision of the Area Arbitrator is attached hereto as Appendix I and the decision and opinion of the Coast Arbitrator is attached hereto as Appendix II. Cases numbered five (5) through twelve (12) of the Area Arbitrator's decision, and each of them, clearly and unmistakably show that each of the matters therein complained of occurred while Pete Velasquez was performing his duties as Night Business

Agent and an officer of plaintiff Local 13. The duties and official capacity of a Night Business Agent are set forth in Section 4 of the "Constitution-By-Laws-General Rules" of Local 3 which is attached to plaintiff's complaint as Exhibit "C". [TR. p. 86.]

Of the charges in cases numbered 1 to 4, Pete Velasquez was found not guilty as to Case No. 1, Case No. 2 consisted of two complaints, one being in February, 1959, prior to the present collective bargaining agreement, and the other being a complaint against Pete Velasquez *while he was employed as a Union Business Agent during September, 1960*, and also prior to the present collective bargaining agreement. The matters of Case No. 2 were only offered to show that Pete Velasquez was a continuous and repeated offender, *and the arbitrator found that they did not support the employer's contention.* (Appendix I, pp. 1-8.)

Case No. 3 involved Pete Velasquez as a working longshoreman, and he was found guilty. Case No. 4 involved Pete Velasquez as a working longshoreman and he was also found guilty in that case. However, neither Case No. 3 nor Case No. 4 found Pete Velasquez guilty of violation of Section 17.81 of the Pacific Coast Longshore Agreement or that any work stoppage delayed a vessel, each of these elements together with the finding that Velasquez deliberately and repeatedly delayed vessels being necessary to deregister Pete Velasquez. [Sec. 17.81 Pacific Coast Longshore Agreement, TR. p. 53.]

The decision of the Coast Arbitrator, Appendix II, summarized the 12 cases on pages 4, 5, 6, and on page 8 the Coast Arbitrator stated:

"The area arbitrator's awards found Velasquez guilty in case after case of having violated Section 17 of the agreement."

The Coast Arbitrator thereafter deregistered Pete Velasquez based upon the matters which were before the Area Arbitrator and in doing so deregistered Velasquez for his activities as a union official, stating:

“For purposes of assessing a penalty this provision includes union officers. They are employees only on leave when elected to union office.” (Appendix II p. 7.)

The deregistration of Pete Velasquez was not only one and the same as having discharged him from his employment, it discharged him permanently from all employment of the many employers under the Pacific Coast Longshore Agreement which comprises substantially all employment within the industry. [Tr. p. 400, Velasquez aff., pars. 17 and 18.] Said discharge being for union activities.

There can be no question as to Velasquez' status and that the arbitrators were aware of his status and made a distinction as to when he was employed as a longshoreman and when he was employed as a union official both in their awards and during the hearing. The transcript [Ex. 6-c page 202] provides:

“Mr. Bulcke: In the previous session where the union participated, we dealt with alleged violations that involved Pete Velasquez as an employed longshoreman these complaints deal with alleged violations in the capacity of business agent.” (“These complaints” referring to cases 5 through 12).

The transcripts of the proceedings before the Area Arbitrator were before the Coast Arbitrator as was the Arbitrator's award. [Ex. 7, Coast Arbitrator, TR. pp. 4-7.]

Section 7 of the *Labor Management Relations Act*, as amended, 29 U.S.C. Section 157, provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3).”

Section 8(a) (1) and (2) of the *Labor Management Relations Act*, as amended, 29 U.S.C. Sec. 158(a) (1) and (2) provides in part as follows:

“Sec. 8(a) It shall be unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

“(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:
* * *”

A discharge for union activities whether or not said discharge is in whole or only in part for union activities is unlawful and a violation of Sections 7 and 8 (a) (1) and (2) of the *Labor Management Relations Act* as coercion and interference with the employees' rights.

In *N.L.R.B. v. Barberton Plastic Products, Inc.*, (6th Cir. 1965) 354 F. 2d 66, 68 the court stated:

“(3) In determining this question, we apply the well-settled rule that if Hetrick's discharge was

motivated *wholly or even in part* by his union activity, it was illegal despite the existence of adequate cause for firing him. *Wonder State Mfg. Co. v. N.L.R.B.*, 331 F.2d 737 (C.A. 6), *N.L.R.B. v. Elias Brothers Big Boy, Inc.*, 325 F.2d 360, 366 (C.A. 6)” (Emphasis added.)

In similar respect:

N.L.R.B. v. Park Edge Sheridan Meats, Inc.,
(2nd Cir. 1965) 341 F. 2d 725, 728;

N.L.R.B. v. Longhorn Transfer Service, Inc.,
(5th Cir. 1965) 346 F. 2d 1003, 1006.

The present case is more grievous than the above cited cases as the defendants herein make no pretense that the discharge was not for union activities and compound and worsen the situation as they not only want to deregister Pete Velasquez for union activities they wish to deregister Pete Velasquez for activities which allegedly occurred while Pete Velasquez was solely employed as a union official, carrying out the orders of the membership and his superiors. The discharge is of such great magnitude that it not only prevents Velasquez from working for the companies which filed the complaints it also prevents Velasquez from working for other companies and practically all of the employers in the industry. [TR. p. 400, Velasquez pars. 17-18.]

The policy of the act is so broad that an employer may not discharge or threaten to discharge *an employee, who as a union official* represents employees of another company, for his activities as a union official in representing such other employees, even though his own employer is directly damaged thereby; for such a threatened discharge would be a violation of Sections 7 and 8 of the Act. In considering the question and Sections 7 and 8, 29 U.S.C.A., Sections 157 and 158, the Court in *Fort Wayne Corrugated Paper Co. v. N.L.R.B.*, (7th Cir. 1950) 111 F. 2d 869, 874 stated.

“* * * *Employee Markins was a district official of the union and as such represented employees of another company in their collective bargaining efforts with their employer, who, unfortunately for Corrugated, was its customer and withdrew its business from Corrugated because of Markins’ activities. While Corrugated’s reaction in chastising and even threatening its employees whose acts caused it real economic loss is readily understandable, it is not reconcilable with the above section.*”
(Emphasis added.)

If the company could not discharge their employee who was also a union official for his union activities, the defendants certainly cannot coerce, chastise, and deprive an official of Local 13 of his livelihood for activities allegedly carried on while the official was not even an employee of defendants, a fact which is controverted and shown on the face of the arbitration opinions and decisions.

A summary of a portion of the uncontroverted evidence found in the exhibits which clearly shows that Velasquez was discharged for union activities, together with citations to the exhibits, is hereinafter set forth as Appendix III.

The arbitrations awards and decisions were not only void on their face as being contrary to the law, the uncontroverted evidence also establishes them as being void as a discharge of an employee for Union activities. *N.L.R.B. v. Barberton Plastics Products, Inc., supra.*

By Mr. McEvoy’s statement to Mr. Carney, the P.M.A. intended to deregister Pete Velasquez for his activities as a Union Business Agent because “he knows the contract too well” and by Mr. McEvoy’s statement to Mr. Johnston, that the plan to deregister Pete had been considered for a long period of time, the defend-

ant's approach is clear. They designed their plan to deregister Velasquez while he was a union official and for activities carried on as a union official and then waited until he had been out of office and then put their plan into effect. [TR. p. 397, par. 9.]

Local 13's President Curt Johnston was correct in refusing to arbitrate cases numbered 5 through 12 for the arbitration of such cases was an attempt to discharge an employee for union activities and an attempt to violate the *Labor Management Relations Act*.

The lower Court erred in not finding and concluding that the deregistration of Pete Velasquez was for union activities and therefore setting the decisions and opinions of the arbitrators aside as being violative of Sections 7 and 8(a) (1) of the Labor Management Relations Act. The Lower Court further erred in not finding and concluding that the opinions and decisions of the arbitrators were beyond and in excess of the arbitrators' powers and therefore setting the opinions and decisions aside.

D-3. The Decisions and Opinions of the Arbitrators Were Error as a Manifest Disregard for the Law and Should Be Set Aside by Reason of Their Effect in Providing a Means for the Employer to Dominate and Coerce Plaintiff Local 13 and Interfere With the Administration of Plaintiff Union and Deprive the Membership of Representation of Its Choosing in Violation of Sections 7 and 8(a) (1) and (2) of the Labor Management Relations Act, 29 U.S.C., Sections 157 and 158.

The evidence previously set forth in Point D-2 establishes a premeditated plan to deregister and discharge Pete Velasquez for union activities. The affidavits, answers to the interrogatories and the record of the arbitration further show that the arbitration awards

and decisions were designed to, and have the effect of, interfering with the administration of plaintiff Local 13, coercing and dominating said Local and depriving the membership of officials and representatives of their own choosing, and will continue to have such effect as long as the award and decision deregistering Pete Velasquez stands. The arbitrators were made aware of the above contentions and the effect of their intended acts prior to the ex parte arbitration of Cases 5 through 12. [Ex. 6-B, p. 178.]

A summary of a portion of the uncontroverted evidence found in the exhibits which clearly show domination, coercion and interference of defendant P.M.A. by reason of the arbitrators' decisions and opinions, together with the citations to the exhibits is hereinafter set forth as Appendix IV.

The exhibits further shown how defendant P.M.A. has, and continues to use the opinions and decisions of the arbitrators to interfere with, threaten and harass plaintiff and its members by threatening to discharge officials of plaintiff, Local 13, for carrying out their duties in administering the Collective Bargaining Agreement and by bringing similar charges against said officials.

Section 8(a) (1) and (2) of the *Labor Management Relations Act*, as amended provides:

“Sec. 8. (a) It shall be an unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

“(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *”

In order that a labor organization shall maintain itself as truly representative of an employee's interests section 8 of the *Labor Management Relations Act* prohibiting domination and interference must be broadly interpreted so as not to destroy its purpose or legislative intent. *N.L.R.B. v. Groszold Mfg. Co.*, (3rd Cir. 1939) 106 F. 2d 713, 722. The interpretation of Section 8 is not only broad but the manner of its proof is also broad. In the case of *N.L.R.B. v. Mr. Chemens Potter Co.*, (6th Cir. 1945) 147 F. 2d 262, 266, the court stated:

“* * * As we observed in *National Labor Relations Board v. Clinton Woolen Mfg. Co.*, 141 F.2d 753, 758, ‘Interference, coercion, and domination are active processes. They may, of course be inferred from a course of conduct even though no overt acts are proved * * *’”

Regardless of the manner in which the employer coerces the Union or interferes with its administration the coercion or interference is a violation of the Section 8. In the case of *N.L.R.B. v. Virginia Electric & P. Co.*, (1945) 314 U.S. 469, 62 S. Ct. 344, 348, the Court stated:

“And in determining whether a course of conduct amounts to a restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways.”

The policy of the Labor Management Relations Act to prevent coercion by the employer and interference with the Union is as broad as may be necessary to provide the required protection and is broad enough to prevent the employer from doing indirectly that which the employer cannot do directly. In *Local 636, etc. Plumbing and Pipe Fit. Ind. of U.S. v. N.L.R.B.*, 287 F. 2d 354 (1961) which involved the plumbing industry and

numerous employers, the superintendents of some of the employers were members of the Union some served upon the executive board and some participated in negotiations, it was agreed that these activities were carried on in complete good faith and the supervisor's actions were not authorized or ratified by the employer. The Circuit Court upheld the board's findings that the above activity amounted to participation of these employers in the internal affairs of the Union and "constituted employer violations of Sections 8(a) (1) and (2) of the Labor Management Relations Act." In doing so the Court at page 361 stated:

"As the Supreme Court said in *International Association of Machinists*, supra, 311 U.S., at page 80, 61 S.Ct. at page 88:

"(I) Interference must be determined by careful scrutiny of all the factors, *often subtle*, which restrain the employees' choice * * *"

"(5, 6) We think that active participation in union affairs by supervisors was aptly characterized as 'interference' by the Board. We also agree with the Board in charging the interference thus found to the respondent employers. 'The policy of the Act is to insulate employees' jobs from their organizational rights.' *Radio Officer's Union*, supra, 347 U.S. at page 40, 74 S.Ct. at page 335. '*We are dealing here * * * with a clear legislative policy to free the collective bargaining process from all taint of an employer's * * * influence.*' *Machinists*, supra, 311 U.S. at page 80, 61 S. Ct. at page 88." (Emphasis added.)

In *N.L.R.B. v. Employing Bricklayer's Ass'n of Del Val. & Vic.*, 202 F. 2d 627 (3rd Cir. 1961) where officers and supervisory employees of respondent employers, who were dues-paying union members, partici-

pated in the affairs of the union and voted for its officers and there was no contention that the employer dominated or assisted the union or that the persons participated other than as individual members, the Court at page 629, stated:

“(2) It is clear that the Board properly concluded in the instant case that respondents interfered with the internal administration of the affairs of the Union by participating in the selection of union officers and bargaining representatives and that its order should be enforced.”

The case of *Fort Wayne Corrugated Paper Co. v. N.L.R.B.*, *supra*, 111 F. 2d 869, 873, 874 made the premise clear that the discharge of a union official, for union activities which damaged the employer, was a violation of sections 7 and 8 of the Act (29 U.S.C. Secs. 157 and 158) even if the union official was an employee. In the present case Velasquez was not even an employee of defendant P.M.A. or employed under the collective bargaining agreement. Velasquez was solely employed by the plaintiff Local 13, during the alleged events of cases numbered 5 through 12 which were basis for his deregistration.

The right to have the union operate in a climate free of coercion is the cornerstone of the *Labor Management Relations Act*. *Local 57, International Ladies Garment Workers Union v. N.L.R.B.*, (1967) 374 F. 2d 295, 301. In substance the arbitration opinions and decisions and the confirmation of the opinions and decisions by the lower Court are destructive of the *Labor Management Relations Act* and strike at its very cornerstone. To uphold the deregistration of Pete Velasquez for union activities is coercion of the membership of Local 13 and interference with the administration of the Local in its strongest and purest

form. The violation of the *Labor Management Relations Act*, and its policy, is as flagrant as could be conceived under any set of facts and the violation together with the interference and coercion extending therefrom has continued and will continue until the decisions and opinions of the arbitrators are vacated and set aside.

Domination exists even though it may be the result of a prior act which has terminated; one of the tests being whether the collective bargaining, is “free from all taints of employer domination * * * or influence.” *Sperry Gyroscope Co. v. N.L.R.B.*, (2nd Cir. 1942) 158 F. 2d 448, 456. In the present case the act of defendants is a continuing act of domination and interference and must by reason of the terms of the arbitration award and decision continue until such time as the award is set aside. Administering the collective bargaining agreement is one of the more important and a continuing function of a union, (*International Union v. Hoosier Cardinal Corp.*, *supra*, 383 U.S. 696, 86 S. Ct. 1107) for without administration, the collective bargaining agreement has no effect. Deregistration or threat of deregistration for acts arising out of the administration of a collective bargaining agreement is the most patent type of domination and interference by an employer and is much more than a taint of domination or influence, it is domination and influence carried to its ultimate.

Influence by management even though it may be “ever so slight” is a violation of the Act, the requirement being that “labor will be represented by persons or organizations having only its interest in mind, and acting wholly uninfluenced by fear or favor, of or from the management.” *N.L.R.B. v. Brown Paper Mill Co.*, (5th Cir. 1940) 108 F. 2d 867, 871. The employer must keep his hands off and “exert no influence over his employees *either directly or indirectly* * * *.”

N.L.R.B. v. Cleveland-Cliffs Iron Co., (6th Cir. 1943) 133 F. 2d 295, 301. The mere threat of *economic reprisal* is a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Yale Manufacturing Company*, (1st Cir. 1966) 356 F. 2d 69, 72 and the description of *past union conduct* is itself a threat of future action. *N.L.R.B. v. J. W. Mays, Inc.*, (2nd Cir. 1965) 356 F. 2d 693 and it is not necessary to show that any employee was intimidated or coerced by the threat. *N.L.R.B. v. Electric Steam and Radiator Corporation*, (6th Cir. 1963) 326 F. 2d 733, 736.

Acts of an employer which amount to coercion, interference or domination are a violation of Section 8(a)-(1) of the Act even though the statements or acts are not directly coercive, they are a violation *if they can reasonably be construed to be coercive by the employee*. *N.L.R.B. v. Electric Steam and Radiator Corporation, supra*, page 736. The protection of the rights of employees in the above regards are so extensive that they are protected "even though no union activity be involved, or collective bargaining be contemplated." *N.L.R.B. v. Phoenix Mutual Life Ins. Co.*, (7th Cir. 1948) 167 F. 2d 983, 988.

In the present case the threat, coercion, domination and interference is more than slight, it is bold and menacing, it interferes with the administration of the collective bargaining agreement and the right of the employees and members to be represented by officials of their own choosing. An official which is hampered in his duties in the administration of the collective bargaining agreement by threat of economic reprisal is not an official, in the true sense, of a member's own choosing. In similar respect, *an official is an agent, employee, and representative of the membership; a threat against the official is a threat against the membership and an interference with their rights.*

The lower Court erred in not finding and concluding that the opinions and decisions of the arbitrators were violative of Sections 7 and 8(a) (1) and (2) of the Labor Management Relations Act and therefore setting the opinions and decisions aside. The lower Court further erred in not finding and concluding that the opinions and decisions of the arbitrators were beyond and in excess of their powers and therefore setting the opinions and decisions aside.

D-4. The Decisions and Opinions of the Arbitrator Were a Manifest Disregard for the Law and in Violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, as Constituting an Award of Damages Against a Union Official and Should Have Been Set Aside by the Lower Court.

Section 301 of the *Labor Management Relations Act*, 29 U.S.C., Section 185, permits suits for violation of a collective bargaining agreement and provides that the judgment rendered shall not be enforceable against any individual member or his assets. In construing the use of the word "between" in subsection (a) thereof, the courts have held that that word refers to violations of contracts between labor organizations and employers and refers to the contracts, not suits. *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 618.

In respect to Section 301 of the Act, union officials also have an immunity as to suits by employers over alleged breaches of the collective bargaining agreement. In *Fifth Avenue Coach Lines, Inc. v. Transport Workers Local 100*, (S.D.N.Y. 1964) 235 F. Supp. 842, suit was brought by the employer against the union and its president for breach of the collective bargaining agreement due to a twenty (20) day strike on the part

of the union. The union moved for a stay of the proceedings pending arbitration in accordance with the collective bargaining agreement and the President moved to dismiss on the ground of failure to state a claim for which relief could be granted. The Court granted both motions and at page 845 stated:

“(2) Also before the Court is Defendant Quill’s motion to dismiss the complaint against him. Quill is alleged in the complaint to have ‘counseled, procured, induced and caused the * * * breach of contracts * * * and * * * the aforesaid illegal strike’. Quill was the president of the union, and the Supreme Court has held that an action under Section 301 (a) of the Taft-Hartley Act lies against the Union, and that no action lies against the president of the Union. *Atkinson vs. Sinclair Refining Co.*, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed. 2d 462 (1962). Accordingly, defendant Quill’s motion to dismiss as against him will be granted.”

In the case of *Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 82 S. Ct. 1318 where Count II charged the individual defendants with a violation of the no strike clause, (p. 246) the Company contended that the union officers confederated and conspired to cause the employer expense and damage and induce breaches of labor contract and interfered with the performance thereof, in dismissing Count II due to the naming of union officials therein and holding that an action for damages could not be brought against said officials, the Supreme Court at page 247 stated:

“Under any theory, therefore, the company’s action is governed by the national labor relations law which *Congress commanded this court to fashion* under Section 301 (a). We hold that this law requires the dismissal of Count II for failure to state a claim for which relief can be granted—whether

the contract violation charged is that of the union or that of the Union plus the Union officers and agents.”

“The *national labor policy* requires and we hold that when a union is liable for damages for violation of the no-strike clause, *its officers and members are not liable* for these damages.” (p. 249) (emphasis added.)

In the present case if the work stoppages actually complained of existed, then the union was liable. *N.L.R.B. v. Local 815 International Brotherhood of Teamsters*, (2d Cir. 1961) 290 F. 2d 99, 103. The union being liable then no action could have been taken against Velasquez. *Atkinson v. Sinclair Refining Company*, *supra*, *Fifth Avenue Coach Lines v. Transport Workers Local 100*, *supra*. The *Atkinson* case, *supra*, recognized that a no strike clause established a rule of conduct which may justify the discharge of employees (p. 246) but denied such application or discipline as against a union official.

In *Smith v. Evening News Association*, 371 U.S. 195, the Court stated: “Section 301 is not to be given a narrow reading.” In *Atkinson v. Sinclair Refining Company*, *supra*, at page 249, the Court stated: ‘We would undercut the Act and defeat its policy if we read Section 301 narrowly.’ ”

Further a claim which cannot be maintained at law or is discharged by law is not arbitrable irrespective of the existence of an arbitration agreement. *L. O. Koven Brothers, Inc., v. Local 5757 United Steelworkers*, (N.J. 1966) 250 F. Supp. 810. Arbitration itself is merely a form of trial which takes the place of a trial at common law.

Wilco v. Swan, *supra*, 201 F. 2d 439;

Murray Oil Products v. Matsui and Co., 146 F. 2d 381, 383.

The decision deregistering Pete Velasquez was no different from an action at law assessing damages against Pete Velasquez for alleged work stoppages which allegedly occurred with Velasquez was solely employed as an official of Local 13. Such action could not have been maintained at law nor can it be done indirectly under the guise of an arbitration so as to thwart and subvert the law and “undercut” Section 301 of the Act, for arbitration has the same effect as an action at law.

The affidavit of Pete Velasquez [TR. p. 393] in paragraphs 14, 15 and 16, page 6 sets forth Velasquez’ many years of contributions to the pension welfare plans and his and his family’s rights thereunder and his being deprived thereof by his deregistration. Paragraph 16 sets forth his right to \$1200.00 from the mechanization fund and his deregistration depriving him of said sum and of future benefits from the mechanization fund. Paragraphs 17 and 18 on page 8, set forth Velasquez’ seniority rights, his advancement to the position of winch driver and how he was barred from and deprived of all of his rights by his deregistration and thus prevented from working in the industry and that the effect of the deregistration was so broad that he is precluded from working for employers that did not file or make charges against him. The damage and coercive effect in respect to loss of pension and welfare rights has been recognized by the courts. *N.L.R.B. v. International Brotherhood of Teamsters*, *supra*, 299 F. 2d 99, 102, 103.

Defendant P.M.A. has attempted, with the aid of arbitrators, to “undercut,” thwart and subvert the law and to do indirectly that which defendant could not have done directly. The effect of the award is clearly to assess damages against Velasquez for work stoppages allegedly created while he was a union official. The *Labor Management Relations Act* and public policy

as evidence by the National Labor Policy is clearly broad enough to prohibit the result obtained by defendant. There is little difference and no distinction between defendant's withholding mechanization money which they held in trust for Velasquez or executing on money held by him. The effect on Velasquez is the same as money damages when he is deprived of earning sums to which he is entitled. The acts of defendants are a subterfuge which even lacks being subtle, and are a violation of the act even as the most subtle of subterfuges are.

The lower Court erred in not finding and concluding the opinions and decisions of the arbitrators were violative of Section 301 of the Labor Management Relations Act and therefore setting the opinions and decisions aside. The lower court further erred is not finding and concluding that the arbitrators' decisions and opinions were beyond their powers and therefore setting the decisions and opinions aside.

D-5. The Decisions and Opinions of the Arbitrators Were in Error and a Manifest Disregard for the Law as Being an Unauthorized Modification of Section 17.81 of the Pacific Coast Longshore Agreement in Violation of the Provisions of Sections 8(d) (1) (2) and (3) of the National Labor Relations Act and Should Have Been Set Aside by the Lower Court.

Sections 8 (d) (1) (2) and (3) of the Labor Management Relations Act, 29 U.S.C.A., Section 158, subsections (d) (1) and (2) provide that only means by which a collective bargaining agreement can be modified setting forth the time and notices required.

The *affidavit of Curt Johnston* [TR. p. 447, lines 20-32] sets forth the manner in which the Pacific Coast Longshore Agreement is ratified by a member-

ship referendum ballot that no such issue of including officers in Section 17.81 was ever put to any ballot or approved or authorized by the membership. The affidavit sets forth that never before had such an interpretation been applied to Section 17.81.

For their own benefit, defendant P.M.A. have modified Section 17.81 of the Pacific Coast Longshore Agreement and obtained Harry Bridges' acquiescence in same, however, the attempted modification was not done either as prescribed by 29 U.S.C.A., Section 158, subdivisions (d) (1) and (2) or approved by referendum ballot and is therefore void and of no effect. The defendants obtained the modifications, to the detriment of Local 13 and Pete Velasquez through the use of arbitrators even though Section 17.52 of the Pacific Coast Longshore Agreement provided that "Powers arbitrators shall be limited strictly to the application and interpretation of the agreement as written." Such modification having been made contrary to the specific terms of Secs. 17.81 and 1.71 of the agreement.

Section 22.1 of the Pacific Coast Longshore-Agreement provides:

"No provision or term of this Agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto."

There is no showing of any such written amendment or modification and none could be had as same would be contrary to the *Labor Management Relations Act*, as previously set forth, and consequently void. Section 22.1 was previously dealt with in an appeal from the granting of a motion for summary judgment in *Williams v. Pacific Maritime Association*, (9th Cir. 1967) 384 F. 2d 935, 939, where the Court noted that purported new rules were not adopted in the manner provided by the Collective Bargaining Agreement.

Such a modification was dealt with *Clark v. Hein-Werner Corp.*, (1960) 100 N.W. 2d 317, 7 Wisc. 2d 264 where the rights of the employees had been fixed under a collective bargaining agreement and the Court held that the union did not have the right to barter them away before an arbitrator even though the union could have in the first instance contracted to accomplish the same result. In the present case the facts are stronger for in the present case the union could not have in the first instance contracted to include union officials in Section 17.81 of the agreement for such an inclusion would be contrary to law and public policy.

The lower Court erred in not finding and concluding that the decisions and opinions of the arbitrators were a wrongful modification of the Collective Bargaining Agreement in violation of Sections 8(d) (1) (2) and (3) of the National Labor Relations Act and beyond and in excess of the powers of the arbitrators and in not therefore setting the opinions and decisions aside.

E. The Legal Significance of Including Union Officials in Section 17.81 of the Pacific Coast Longshore Agreement, Together With the Effect of Such an Inclusion as Being Violative of the Labor Management Relations Act, Public Policy or the Terms of the Arbitration Provisions Were Questions for the Lower Court to Decide.

The points hereinbefore set out in respect to the arbitrators' decisions being a manifest disregard for the law or set out hereinafter as to whether the arbitration decisions are void as being contrary to law or public policy are each matters of law which are appropriate for this court to decide and as such and are not matters within the exclusive province of the arbitrators. The arbitration was a limited arbitration with the powers of the arbitrators limited to Section 17.52 and Section

17.62 of the Agreement to interpreting “the contract as written,” with Section 17.53 providing the decisions must be based on a showing of facts and their application under the specific provisions of the written Agreement; and with Section 22.1 providing that the provisions of the Agreement could not be amended, modified, changed, altered or waived except by written document executed by the parties. The interpretation of Section 17.81 thereby becoming one of law and a proper one for the lower Court to have made.

In *Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Union*, (2nd Cir. 1966) 359 F. 2d 598, 602, 603, the Court in considering whether a matter should be submitted to arbitration stated:

“The resolution of the present controversy requires (1) a determination of whether the union violated Section 8(b) (4) of the NLRB, and (2) an assessment of the actual business injuries sustained by the employer. Courts hardly can be considered less competent than a labor arbitrator, whose forte is more likely to be in the area of contract disputes and ‘employee’s grievances claims’ * * *.” (Emphasis added.)

In *Watkins v. Hudson Coal Co., supra*, 161 F. 2d 311, 320, the court stated:

“* * * The sufficiency of the wage formula and the provisions for waiver are entirely separable elements of the contract between the parties. *We do not refer to arbitration the question of legality of the formula. That is a question of law which the court must take responsibility in answering.*” (Emphasis added.)

In the above respects the lower court did find “That the award manifestly disregards the collective bargaining agreement and the law.” [Finding K, TR. p.

618.] The lower court then concluded "The claim that the award is a manifest disregard for the collective bargaining agreement and the law does not raise any breach of I.L.W.U.'s duty of fair representation." [Conclusion IV, K, TR. p. 636.] The Court's finding was correct, however, the court erred grievously in its above conclusion.

F. The Lower Court Erred in Not Finding and Concluding That the Awards Were Contrary to and in Violation of Public Policy and in Not Therefore Vacating and Setting the Opinions and Decisions Aside.

Plaintiff in its second cause of action pled facts setting forth that the opinions and decisions of the arbitrators were void as against public policy. [TR. pp. 75, 76, 2nd cause of action.] Plaintiff by affidavit and answer to interrogatories set forth the grounds in support of its second cause of action whereby the opinions and decisions were void as being contrary to Public policy and the National Labor policy as provided by Sections 7, 8 and 301 of the *Labor Management Relations Act*. Such facts being the same facts previously recited herein in points D through D-5 as being grounds for setting the decisions and opinions aside as being violative of the Labor Management Relations Act and a manifest disregard for the law.

The Court made no finding, conclusion or decision in respect to public policy or the national labor policy and rendered its decision without considering same therein and thereby further erred.

The public policy as set forth by the National Labor Policy renders the arbitration awards or decisions void and only differs in its effect from violation of the Statutory law in that it is broader and more encompass-

ing. In the case of *Local 45 International Union of Electrical Radio and Machine Workers, AFL-CIO v. Otis Elevator Co.*, 314 F. 2d 25, (2d Cir. 1963) the court in analyzing the effect of public policy on the substantive law pertaining to an arbitrator's decision, stated:

"It is no less true in suits brought under Sec. 301 to enforce arbitration awards than in other law suits that the 'power of the federal courts to enforce in terms of private agreements is at all times exercised *subject to the restrictions and limitations of the public policy of the United States.* * * *' Hurds vs. Hodge, 334 US 24, 34-35, 68 S. Ct. 847, 852-853, 92 L.Ed. 1187 (1948). *The public policy to be enforced is a part of the substantive principles of Federal labor law* which federal courts, under the mandate of *Textile Workers Union of America vs. Lincoln Mills*, 353 US 448, 77 S.Ct. 912, 1 L.Ed.2d 962 (1957), are empowered to fashion. Cf. *Local 174, Teamsters, etc. vs. Lucal Flour Co.*, 369 US 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962) *Thus, when public policy is sought to be interposed as a bar to enforcement of an arbitration award, court must evaluate its asserted content.*" (Emphasis added.)

The same effect:

Metal Products Workers Union Local 1645 v. Torrington Co., (2nd Cir. 1966) 358 F. 2d 103, 106;

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S. Ct. 912.

The violation of public policy in the present case is Defendant's previously set forth attempt to "undercut" and circumvent Sections 7 and 8 (a) (1) (2) and (3)

of the *Labor Management Relations Act* by obtaining arbitration opinions and decisions including union officials in the interpretation of Section 17.81 of the Pacific Coast Longshore Agreement; thereby deregistering a former union official for alleged acts which he carried out as a union official and discharging him for union activities. The foregoing having the further effect of coercion upon the part of Defendant P.M.A. against Plaintiff and Plaintiff's members in violation of the Act and interference by Defendants in the administration of Plaintiff's Union in further violation of the Act. The violation of public policy is further present in that the opinions and decisions have the effect of awarding damages against the former union official Pete Velasquez in violation of Section 301 of the Act, and improperly modifying the collective bargaining agreement to the detriment of plaintiff and plaintiff members.

The public policy involved is the National Labor policy. The matter of affirming or vacating an award was summed up in the case of *Textile Workers Union of America v. Cone Mills Corp.*, 188 F. Supp. 728 affirmed (4th Cir. 1961) 290 F. 2d 921, in affirming the arbitration award the court stated:

"The questions for determination is whether the award should be affirmed and enforced, or should be vacated and set aside as invalid. In making this determination, we are directed to apply federal substantive law 'fashioned from the policy of our national labor law' *Textile Worker Union vs. Lincoln Mills*, 1957, 353, US 440, 77 S.Ct. 912, 918, 923, 1 L.Ed. 2d. 972; *Textile Workers Union of America vs. Cone Mills Corp.* (4th Cir. 1959) 262 F.2d 920." (Emphasis added.)

In the case of *Textile Workers Union of America v. Lincoln Mills of Alabama*, *supra*, 353 U.S. 448, 457, 77 S. Ct. 912, the Court stated:

“The Labor Management Relations Act expressly provides some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy to effectuate the policy.” (Emphasis added.)

Likewise the provisions of the Labor Management Relations Act must be read as part of every collective bargaining agreement and the agreement interpreted in light thereof.

N.L.R.B. v. News Syndicate Company, *supra*;
Pacific Tel. & Tel. Co. v. Communication Workers of America, *supra*;

Manseau v. United States, *supra*;

Flores v. Barman, *supra*.

It is clear that the Labor Management Relations Act is to be looked to to determine the public policy as is represented by the national labor policy and where express statutory sanction is not present the courts may look to the policy behind the legislation to effectuate remedies to prevent the circumvention of the Act by the employer attempting to “undercut”, thwart and subvert the law by doing indirectly that which it cannot do directly.

In the present case the manner and manners in which the opinions and decisions of the arbitrators directly or indirectly violate the *Labor Management Relations Act* and “undercut”, thwart and subvert the intent of the act have been set forth in Points D through D-5 hereof. Each of the violations set forth in Points D

through D-5 hereof being also a violation of public policy as represented by our National Labor Policy and each being an additional ground requiring the Judgment of the lower court be reversed and the arbitration awards vacated and set aside.

Had the parties by the express terms of the collective bargaining agreement included union officers in the provisions of Section 17.81 due to the coercive effect previously set forth in Points D-1 through D-4 hereof the provisions would have been violative of the Labor Management Relations Act and therefore unenforceable and subject to being terminated. *N.L.R.B. v. American Rolling Mill Co.*, *supra*, 126 F. 2d 38, 41; *Red Star Exp. Lines v. N.L.R.B.*, *supra*, 196 F. 2d 78. Likewise to allow an arbitrator to apply Section 17.81 to union officials contrary to the terms of the agreement would be contrary to both public policy, the National Labor Policy and the *Labor Management Relations Act* and the arbitrators' decisions making such an application would be and are void.

The lower court erred in not concluding and finding that the arbitrators' awards and decisions were contrary to the public policy and the National Labor Policy and in excess of the arbitrators' powers and further erred in not setting the opinions and decisions aside on such grounds.

G. The Provisions of an Arbitration Award That the Award Shall Be "Final and Binding" Does Not Prevent Review of the Award and the Setting of the Award Aside on the Grounds Set Forth in 9 U.S.C. Section 10 or on the Grounds That the Award Was Contrary to the Law or Violative of Public Policy and the Lower Court Erred in Finding and Concluding to the Contrary.

The lower Court in its Conclusion Number IV K, [TR. p. 637] refers to the provisions of Section 17.27

of the Pacific Coast Longshore Agreement which provides: "the decision of the Coast Arbitrator shall be final and binding" and concludes:

"Clearly, the parties to the PCLA intended the grievance procedure with final and binding arbitration would be the exclusive method for resolving disputes arising under that agreement."

The lower Court continued to conclude [TR. p. 638] as follows:

"Accordingly, and since the power of this Court to review the Arbitrator's award here at issue is limited by the rules enunciated in the cases cited above, we must conclude that Plaintiff has not stated, alleged or claimed any facts whatsoever that would establish a cause of action for collateral attack upon the grievance procedure followed in this case and particularly upon the awards of the Coast Arbitrator and Area Arbitrator."

The lower Court erred in its above conclusions and findings which in substance finds and concludes that the Court had no jurisdiction to set the awards aside under the provision of the *Arbitration Act, 9 U.S.C. Section 10* or on the grounds that award was violative of the law, public policy or a manifest disregard for the law. Even without stating so in the Agreement an Arbitration Award, by its normal effect is final and binding. *Charles H. Tompkins Company v. Lloyd E. Mitchel*, (C.A.D.C. 1958) 259 F. 2d 177.

Though an arbitration award is final and binding, it is subject to being set aside under the provisions of the *Arbitration Act 9 U.S.C.A.*, Section 10 or as being contrary to law or public policy. Consequently adding the provisions in an arbitration agreement that the decision shall be "final and binding" adds nothing for it merely states the effect of an arbitration award until set aside.

In considering an arbitration agreement which went far beyond the arbitration agreement in the present case

in that the agreement there involved provided that *neither party should contest or appeal from the award*, the Court in *Arlington Towers Land Corp. v. John Shain, Inc.*, (1957) 150 F. Supp. 904, 923, stated:

“Although the arbitration agreement specifically provides that the award of the arbitrator *shall be final and binding*, that *neither party shall contest such findings and that neither party will appeal from any portion of the final judgment*, there appears to be no doubt but that the Plaintiffs are within their rights in challenging the arbitration award, particularly on the grounds of fraud, bias and prejudice.” (Emphasis added.)

In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, (1960), *supra*, 363 U.S. 593, 597, 80 S. Ct. 1358, where the agreement to arbitrate set forth that the arbitrator’s decision “*shall be final and binding on the parties*” the Court stated:

“Yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.”

In similar respect:

Goodall-Sanford, Inc. v. United Textile Workers, (1st Cir. 1956) 233 F. 2d 104, 107, affirmed 353 U.S. 550, 77 S. Ct. 920;

Local 453 International Union of E.R. and M. Workers v. Otis Elevator Co., (2nd Cir. 1963) 314 F. 2d 25, 28, Cer. den. 373 U.S. 949, 83 S. Ct. 1680;

Dallas Typographical Union Number 173 v. A. H. Belo Corporation, 372 F. 2d 577.

The adding of “final and binding” in an agreement adds nothing more than the natural legal effect of an award until set aside. However, in the present case the collective bargaining agreement itself in Section 17.15 thereof provides that after exhaustion of the remedies

that one can go outside of the agreement for relief. The section in part provides [TR. p. 53] :

“No other remedies shall be utilized by any person with respect to any dispute involving this Agreement until the grievance procedure has been exhausted.”

Plaintiff had exhausted the grievance procedure and was before the lower Court entitled to relief by reason of the matters set forth in Plaintiff's Complaint and the Affidavits and evidence in support thereof. Plaintiff had pleaded and proved grounds for relief under 9 U.S.C. Section 10, and on the grounds that the award was violative of public policy and a manifest disregard for the law as being violative of the Labor Management Relations Act.

The lower Court erred in finding and concluding that the opinions and decisions of the arbitrators were not subject to review and further erred in not reviewing the opinions and decisions of the arbitration and finding and concluding and adjudging that said opinions and decision be set aside on each of the grounds set forth in this Brief.

H. Appellant Pleaded and Proved Additional Grounds of Fraud, Undue Means, Evident Partiality, Corruption on the Part of the Arbitrators and the Exceeding of Their Powers by the Arbitrators; Each Being Grounds for Setting the Arbitrators' Decisions Aside Under the Arbitration Act, 9 U.S.C. Section 10, and the Lower Court Erred in Not Considering and Finding and Concluding on Such Grounds and in Not Setting the Arbitrators' Decisions Aside and in Confirming and Enforcing Same.

The pleading of fraud, undue means, evident partiality, corruption and excess of the arbitrators' powers is found in the first cause of action of Plaintiff's

Amended Complaint, more particularly Paragraph XXI, pages 8 and 9 thereof. [TR. pp. 72-73.] The proof thereof being contained in Exhibits 1, 2, 3, 4, 5, 6A, 6B, 6C and 7, together with the Answers to Interrogatories which were submitted in opposition to Defendant's Motion for Summary Judgment.

The lower Court in its Findings, Conclusions and Judgment ignored and omitted any consideration of the grounds set forth in the *Arbitration Act*, 9 U.S.C. for setting an arbitration award and decision aside. In substance the Findings, Conclusions and Judgment of the lower court were tantamount to holding that the provisions of the *Arbitration Act* and the relief available thereunder were not applicable and a denial of any relief under the *Arbitration Act*. In each of the foregoing respects the lower court erred, such error being hereinafter more particularly set forth.

H-1. The Arbitration Decisions Should Be Set Aside for Evident Partiality and Corruption.

The claim of evident partiality was made and the Court was under a duty to review the record to determine if evident partiality had been shown on the part of the Arbitrator. *Saxis Steamship Co. v. Multifacs International Traders Inc.*, *supra*, 375 F. 2d 577, 582. In the present case both evident partiality and corruption on the part of the area arbitrator was shown.

The Arbitration Act 9 U.S.C.A., Section 10, Subdivision (b), for setting aside an arbitration award provides:

“(b) Where there was evident *partiality* or *corruption* in the arbitrators, or either of them.”
(Emphasis added.)

Plaintiff pleaded the ground of evident partiality for setting the arbitrators' decisions aside. [TR. pp. 71-72.] The grounds for setting aside an arbitration

award as are set forth in the *Arbitration Act 9 U.S.C. Sec. 10*, are applicable to setting aside an arbitration award arising from a collective bargaining agreement. *General Electric Company v. Local 205 United Electrical, Radio and Machine Workers of America*, 353 U.S. 547, 548.

The affidavit of Curt Johnston, President of Local 13, [Ex. 2, par. 27, TR. pp. 439-440], sets forth the conversation resulting from a call placed by the area arbitrator, Germaine Bulcke, subsequent to the Union's refusal to arbitrate cases 8 through 12 on the ground that Section 17.81 does not include Union officials and such arbitration was against Federal and State laws, said conversation being prior to the Area Arbitrator arbitrating cases 5 through 12 *ex parte*. The conversation proceeded with the Area Arbitrator attempting to induce Johnston to continue the arbitration and stating [TR. p. 440]:

"It would look better even though we both know Velasquez is guilty, and heaven knows I have tried to help the guy, if you would be there to at least go through the motion."

The affidavit continues in Paragraph 30 [TR. p. 441], that the Area Arbitrator was the only one who took or heard any evidence. The affidavit, in paragraph 37 [TR. p. 444], sets forth the conversation had with the Area Arbitrator soon after the Coast Arbitrator's decision was rendered, in which conversation the Area Arbitrator stated:

"What has happened has happened and one might as well now accept the deregistration of Velasquez then try to negotiate a deal to see if Harry could have him reinstated as a Class B Longshoreman and in possibly six months to a year he may be able to be promoted to Class A. You may have to have some type of agreement that Velasquez will never run for office again to help induce the employers to reinstate him."

The statements of the Area Arbitrator clearly show that he had prejudged the case and had found Velasquez guilty even before hearing the evidence; what the Area Arbitrator wishes was someone to go through the motions of a defense, which is tantamount to asserting that a defense would be useless.

Arbitration provides by law that arbitrators be impartial and there be no corruption. An arbitrator that in substance and effect announces what his decision is going to be before the arbitration and then proceeds to arbitrate *ex parte* cannot be said to be impartial. After evidencing his partiality the arbitrator proceeded *ex parte* with the arbitration either with a pre-conceived bias which prevented him from being impartial, or with orders to proceed and find in a certain manner. By either view that award must be set aside under 9 U.S.C.A., Section 10, for his partiality was evident and by proceeding further in his state of mind he was both partial and corrupt. Bulcke was not satisfied with finding Velasquez guilty, for after the award of the Coast Arbitrator, he intervened on behalf of defendant's attempting to have plaintiff accept the awards, which is in substance asking plaintiff to give up their right to legal redress, he suggested a solution that Velasquez agree not to run for office again, which was in violation of Section 8 (a)(1) of the Labor Management Relations Act. Bulcke was not only not impartial, his partiality and corruption continued and he placed himself in the position of being an advocate.

In *Amicisia Societa Nav. v. Chilean Nitrate and Iodine Sales Corp.*, *supra*, (D.C.S.D. N.Y. 1959) 184 F. Supp. 116, 117, the Court stated:

"However the decision of arbitrators can be upset if it was procured by fraud or *corruption*, if there *was evident partiality*, if the arbitrators exceeded their powers, or if the decision is a perverse misconstruction of the law." (Emphasis added.)

During August 1960, plaintiff's members were locked out of their employment for two weeks by defendant P.M.A. and as a condition of returning to employment the Local was coerced, with Bridges lending support to the P.M.A. into signing an agreement giving up their right to use an independent arbitrator and a new area arbitrator was appointed by Paul St. Sure, P.M.A. President, and Harry Bridges, I.L.W.U. President, to wit, Germaine Bulcke. During November 1964, when Local 13 sought to disqualify Bulcke as to an arbitration and to obtain an outside arbitrator they were refused by Harry Bridges, I.L.W.U. President and Paul St. Sure, P.M.A. President who stated that they themselves were the parties to make the decision and choice regarding the arbitrators. [Ex. 2, Pars. 38-40, TR. pp. 444-445; Ex. 2, Par. 48, TR. p. 448.] The area and coast arbitrators had been long time friends of I.L.W.U. President, Harry Bridges, and both arbitrators had been employed by defendant I.L.W.U. in positions subservient to Harry Bridges. [Ans. Interrogatory 31, TR. p. 199.]

The lower court erred in not finding that there was evident partiality and corruption on the part of the arbitrators and in not concluding therefore that the decisions of the arbitrators should be set aside. The lower Court further erred in its Conclusion Number 3 which on page 19, lines 11 to 17 thereof [TR. p. 624] which provides:

“Local 13 and Velasquez through their Agent, ILWU, have both had their ‘day in court’—fully, fairly and finally, with their right meticulously protected and honored. They lost, but only after a bitter battle in an open arena before two honest Arbitrators—Area and Coast—fair rules.”

Said conclusion is not supported by either the facts or the law and is contrary to both the facts and the law.

H-2. The Arbitration Decisions Should Be Set Aside as Being in Excess of the Powers of the Arbitrators, Not Adequately Grounded in the Collective Bargaining Agreement and as Having Been Arrived at by a Manifest Infidelity of the Arbitrators to Their Obligations.

By the terms of the collective bargaining agreement, the arbitration involved, whether *ex parte* or otherwise, was extremely restricted and severely limited the powers of the arbitrators. The arbitrators not only exceeded their powers and “manifestly” disregarded both the law and the collective bargaining agreement, they showed a manifest infidelity to their obligations by not rendering opinions and decisions adequately grounded in the collective bargaining agreement; therefore, the opinions and decisions cannot be enforced and must be set aside.

The Arbitration Act 9 U.S.C., Sec. 10 (d) provides as grounds for setting aside an arbitration award as follows:

“Where the arbitrators have exceeded their powers,
* * *.”

In the present matter, Section 17.52 of the Pacific Coast Longshore Agreement [Ex. A attached to the complaint] provides in part as follows [TR. p. 53]:

“Powers of the arbitrator shall be limited strictly to application and interpretation of the agreement as written. . . .”

Section 17.53 provides in part:

“Arbitrators’ decisions must be based upon the showing of facts and their application under the specific provisions of the written agreement and be expressly confined to, and extend only to, the particular issue in dispute.”

Section 17.62 provides in part:

“The arbitrator shall act with his powers limited strictly to the application and interpretation of the Agreement as is written.”

Section 22.1 provides:

“No provision or term of this Agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto.”

The provisions out of which the arbitration purportedly arose was Section 17.81 of the Pacific Coast Longshore Agreement. Its applicable portion is as follows:

“17.81 All longshoremen shall perform their work conscientiously and with sobriety and with due regard to their own interests shall not disregard the interests of the employer. Any *employee* who is guilty of deliberate bad conduct *in connection with his work as a longshoreman* or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offense, cancelled from registration . . .” (Emphasis added.)

Section 1.71 defining longshoreman provides:

“The term ‘longshoreman’ as used herein shall mean any man working under this Agreement.”

The power of the arbitrator under Sections 17.52, 17.53, and 17.62 of the Pacific Coast Longshore Agreement are extremely limited twice in the agreement it is set forth that the arbitrators’ powers are “*limited strictly to the application and interpretation of the agreement as written*” and Section 17.53 adds the additional restriction to the power of the arbitrator in that his decision “*must be based upon the showing of facts and their application under specific provisions of the written*

*agreement * * *.*" In brief the limitation as to applying an interpretation of the agreement as written makes its interpretation and application one of law, and the arbitration award void as being in excess of the arbitration powers if their interpretation is contrary to law. The further provisions of Section 17.53 are such that if there is not a showing of facts to support the award that the award is also further void under Section 10(d) of the Arbitration Act as being in excess of the arbitrator's powers. Section 22.1 provides that an amendment or modification must be in writing signed by the parties.

In *Boeing Co. v. International Union United A., A. and A.I. Workers*, 231 F. Supp. 930, 932 (E.D. Penn. 1964); affirmed, *Boeing Co. v. International Union United A., A. and A.I. Workers* (3rd Cir. 1965) in denying arbitration and interpreting an agreement which provided: "The jurisdiction of the arbitrator shall be limited to a determination and application of the specific provision of this agreement at issue. * * *" the court stated:

"(4) The exclusionary clause in the arbitration article, that the 'jurisdiction of the arbitrator shall be limited to * * * the interpretation and application of the specific provisions of this agreement at issue' can only mean that it was intended to limit the scope of arbitrable matter."

Section 17.81 strictly and clearly applies only to an employee in respect to deregistration. The provision not only specifically and clearly uses the word "*employee*," it also places the bad conduct "in connection with his work as a longshoreman." By its terms, and the terms of Section 1.71 as written, the applicable provisions of Section 17.81 only applies to an employee of performing longshore work under the Pacific Coast Longshore Agreement and any interpretation to the contrary is in

excess of the arbitrator's powers and jurisdiction and must be set aside under Section 10 (d) of 9 U.S.C.A. The provisions of Section 17.81 being clear and unambiguous and the interpretation being limited to "the contract as written" the interpretation is one of law and an interpretation which this Honorable Court has the power to make. *Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Union, supra*, 359 F. 2d 598; *Watkins v. Hudson Coal Co., supra*, 151 F. 2d 311.

The lower Court was correct in its Finding No. 18 K. [TR. p. 618] "That the award manifestly disregards the collective bargaining agreement and the law," but erred in not concluding that for these reasons the decisions of the arbitrators should be set aside.

Further, in this regard as set out in Points D through D-4 hereof, the *Labor Management Relations Act*, Sections 7 and 8 (a) (1) and (2) prevents the inclusion of Union officials in the interpretation of Section 17.81 and the provisions of the *Labor Management Relations Act* must be read as a part of every collective bargaining Agreement and the Agreement interpreted in light thereof.

N.L.R.B. v. News Syndicate Company, supra;
Pacific Tel. & Tel. Co. v. Communication Workers of America, supra;

Manseau v. United States, supra;

Flores v. Barman, supra.

The decision in the case of *United Steelworkers v. Enterprise Wheel and Car Corp., supra*, 360 U.S. 593 bears greater weight when one considers that the arbitration provisions of the collective bargaining agreement in that case was much broader in scope and not limited as in the present case. The collective bargaining agreement provided that any difference "as to the meaning and application" of the agreement should be submitted

to the arbitrator and the arbitrator's decision "shall be final and binding upon the parties." The Court at page 597, stated:

"... Nevertheless an arbitrator is confined to interpretation and application of the collective bargaining agreement, he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from any source, *yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrators' words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the awards. * * *.*" (Emphasis added.)

Neither the Area or Coast Arbitrator interpreted the contract as written, both exceeded the power under the agreement and included Union officials in the interpretation and application of Section 17.81. The Coast Arbitrator deregistered Pete Velasquez from any employment with any company under the agreement by reason of his alleged activities as a union official. In an attempt to justify his position and interpretation of Section 17.81 the Coast Arbitrator at page 7 of his decision stated (Appendix II):

"For purposes of assessing a penalty this provision includes Union officers. They are employees only on leave when elected to Union office. * * *"

The arbitrators not only exceeded their powers in rendering their decisions, as their decisions were not adequately founded in the collective bargaining agreement, they manifested an infidelity to their obligations and dispensed their own brand of industrial justice contrary to the provisions of the decision of *United Steelworkers v. Enterprise Wheel and Car Corp., supra*, 360 U.S. 593.

The Collective Bargaining Agreement is not itself a contract of employment, it is a trade agreement with the individual contracts of employment being separate therefrom. (*MacKay v. Lowes, Inc.*, (9th Cir.) *supra*, 182 F. 2d 170); (*N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, *supra*, 236 F. 2d 898). Therefore, during the alleged incidents of cases 5 through 12, no contract of employment existed between defendant P.M.A. and Peter Velasquez; the only contract of employment which existed was between plaintiff, Local 13, and Pete Velasquez who was a union official and an employee solely of plaintiff herein. [TR. p. 395, Velasquez Par. 5; TR. pp. 434, 435, Johnston Par. 11; TR. p. 9, Johnston, Par. 25.] Consequently, for this additional reason the provisions of Section 17.81 could not be applied to Pete Velasquez in respect to cases 5 through 12 and no arbitrable issue was raised. Whether this was an arbitrable issue or not is a matter solely within the jurisdiction of this court to decide. *Atkinson v. Sinclair Refining Co.*, *supra*.

If it had been legal to include the employees of Local 13 in Section 17.81, which it is not, the parties did not make such an inclusion in 17.81 and having omitted Union officials therefrom the arbitrator cannot now make such an inclusion. (*Pacific Tel. & Tel. Co. v. Communication Workers of America*, (1961) 190 F. Supp. 689). Likewise, the arbitrator was bound to interpret the contract as written and any such inclusion made by the arbitrator is void as a matter of law and should be set aside.

The court in *Pacific Tel. & Tel. Co. v. Communication Workers of America*, *supra*, at page 693 stated:

“* * * Where there is an exception or reservation in a contract, it is presumed that no other exceptions or reservations are intended. *Fendall v. Miller*, 99 Or. 610, 196 P. 381. The law will not in-

sert by construction, for the benefit of one of the parties, an exception or condition which the parties, either by design or neglect, have omitted by their own contract. * * *

In holding that there was no arbitrable issue, the court in *Industrial Trades Union v. Woonsocket Dyeing Co.*, 122 F. Supp. 872, 875, stated:

“Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity. *Weaver v. United States*, 8 Cir., 1954, 210 F. 2d 815.”

The court further cited with approval from *Pawtucket Mach. & Supply Corp. v. Monroe*, (1947) 71 R.I. 162, the following:

“* * * The intention sought is only that expressed in the instrument and not some undisclosed intention that the parties may have had in mind.”

Section 17.81 shows no intent to include union officials therein and by its own wording excludes them, the obvious reasons being that such inclusion would be a violation of the Labor Management Relations Act and officials are not employed under the contract. To make such an inclusion would result in an injustice, absurdity and manifest disregard for the law.

In similar respect the court in *N.L.R.B. v. Gulf Atlantic Warehouse Co.*, (5th Cir. 1961) 291 F. 2d 475, 477, stated:

“* * * We think that ordinarily the language of the contract as finally agreed upon must be construed by the courts in accordance with ordinary rules of construction without reference to the give and take of the bargaining sessions which produced the final terminology. Otherwise we would abandon completely the parol evidence rule when dealing with this type of contract.”

The only award the lower court could affirm is one which grants relief under the contract, when as in the present case where the award exceeds the express written terms of the contract then the court is duty bound to set the award aside. In support thereof the court in *Woody v. Sterling Aluminum Products, Inc.*, (1965) 245 F. Supp. 755, 770, stated:

“And the authority of an arbitrator to make such an award is dependent upon the language of the contract, so that when the Court enforces the award it is granting relief under the contract and not exercising jurisdiction independent thereof.”

Also:

United Steel Workers v. Enterprise Wheel and Car Corp., *supra*, 360 U.S. 593.

In the present case the arbitrators did not grant relief under the contract, they exercise jurisdiction independent thereof, and the lower Court correctly found the decisions of the arbitrators was a manifest disregard for the contract. [Finding No. 18, K.T.R. 618.]

Arbitration agreements in respect to the powers of the arbitrators may be broad and liberal or the powers may be limited or severely restricted. In the present case the parties chose to severely restrict the powers of the arbitrator, therefore, any award which is in excess of the power granted is void and must be set aside under Section 10 (d) of the *Arbitration Act*, 9 U.S.C.A. In the above regard the cases herein above cited involve arbitration agreements where the powers of the arbitrator were broader than in the present case. Cases may be cited in which by the terms of the arbitration agreement the powers of the arbitrator are even broader than in the above cited cases, however, such cases do not alter plaintiff's rights arising from restricted powers of the arbitrators and are therefore not

necessarily authority for any proposition in the present case.

In the case of *International Ass'n. of Machinists v. Hays Corporation*, 296 F. 2d 338, 343, the court stated:

"The arbitrator is not a free agent dispensing his own brand of industrial justice. And if the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contracts, it will not be enforced by the courts." (Emphasis added.)

In the case of *Continental Materials Corp. v. Gaddis Mining Co.*, 396 F. 2d 952 (10th Cir. 1962), the court stated:

"Clearly, the decision of the arbitrators, if beyond their jurisdiction has no more effect than a similar judgment of a court."

In the present case the arbitrators exceeded their jurisdiction and dispensed their own brand of industrial justice.

The arbitrators' powers in the present case were restricted to applying facts to the contract as written. To arrive at their decisions they altered and modified the contract, contrary to Section 22.1 then applied the facts; in doing so they exceeded their powers. *J. P. Greathouse Steel Erectors Inc. v. Blount Bros. Const. Co.*, 374 F. 2d 324. They exceeded their powers to such a degree that the decisions were a manifest disregard for both the collective bargaining agreement and the law. [Finding No. 18 K., TR. p. 618.]

As was set forth in *Williams v. Pacific Maritime Association, supra*, (9th Cir.) 384 F. 2d 935, 939 in respect to Section 22 of the Pacific Coast Longshore Agreement which is before this Court:

"But if there were an agreement to such rules, they were not adopted in accordance with the re-

quirements of the basic collective bargaining agreement which provided in Section 22: ‘No provision or term of this agreement may be amended, modified, changed, altered, or waived except by written document executed by the parties hereto.’”

The terms of the Pacific Coast Longshore Agreement in every instance prevented the arbitrators from modifying or altering it. In the same respect acquiescence by Harry Bridges into any interpretation of the agreement was of no effect; any reliance by the arbitrators on any oral statement in respect to the meaning of Section 17.81 was in derogation of their duty to interpret the contract “as written” and a procedure which was not only in excess of their powers but a manner of obtaining the opinions and decisions by “undue means” contrary to the provisions of the *Arbitration Act, 9 U.S.C. Sec. 10*.

The lower Court erred in not considering, finding and concluding that the Arbitrators had exceeded their powers and that the decisions and opinions of the arbitrators were not adequately grounded in the collective bargaining agreement. The lower Court further erred in not setting the opinions and decisions of the arbitrators aside on the ground that they were in excess of the arbitrators’ powers and not adequately grounded in the collective bargaining agreement.

H-3. The Decisions of the Arbitrators Should Be Set Aside Both on the Grounds of Actual and Constructive Fraud.

Plaintiff pled the grounds of fraud for setting the arbitration opinions and decisions aside. [TR. pp. 72-73.] The Court did not consider such grounds and erred in not doing so. The record of the arbitration adequately discloses constructive fraud and the matters

set forth in the lower Court clearly disclosed actual fraud.

The *Arbitration Act*, 9 U.S.C. Section 10(a) provides that an award may be set aside when it was procured by "fraud." In the case of *Marine Transit Corporation v. Drefus*, (1932) 284 U.S. 263, 52 S. Ct. 166 the Court stated:

"We do not conceive it open to question that, where the Court has authority under statute as we find that it had in this case, to make an order for arbitration the Court also has the authority to confirm the award or to *set it aside for irregularity, fraud, ultra vires or other defects.*" (Emphasis added.)

In the case of *Anthony P. Mills, Inc. v. Wilmington Housing Authority*, 179 F. Supp. 199, 202, where the government contracting officer made serious errors in calculations, his decision was labeled constructive fraud as it constituted obvious and gross error. The Court stated:

"Nor is it necessary, in order for the Courts to set aside such a decision, opinion or finding, that the conduct of the arbitrator amount to actual fraud. A finding of constructive fraud is sufficient. Thus, the finding or decision will be set aside *if the decision was fraudulent or was induced by such inattention or indifference to imply bad faith* (citation) *or, there is proof of constructive fraud or gross mistake of such character as to amount to palpable and substantial wrong.*" (Citation.) (Emphasis added.)

As set forth in Point H-1 hereof, the area arbitrator, before proceeding *ex parte* to hear and decide cases numbered 5 through 12, expressed his opinion at the guilt of Velasquez and requested at least a token defense. The area arbitrator then proceeded to arbitrate

ex parte and found Velasquez guilty on Case No. 10 involving the "SS ORNEFJELL" [TR. p. 401, pars. 19-27] and Case No. 9 involving the "SS KOHKA MARU" [TR. pp. 407-410, pars. 32-37], each being matters which Velasquez had handled under the advice of the area arbitrator and in doing so followed the advice of the area arbitrator. The area arbitrator further found Velasquez guilty in Case No. 11 which did not involve the Pacific Coast Longshore Agreement but which involved the I.L.W.U. - Teamster pact. [TR. pp. 403-404, pars. 28-32.]

The matters in respect to Case No. 9 the SS "ORNEFJELL", Case No. 10, the SS "KOKA MARU" and Case No. 11, which only involved the I.L.W.U. - Teamster pact, together with the manner in which the Area Arbitrator, Germain Bulcke, advised Velasquez, in advance, as to how to handle complaints, is set forth in Appendix V together with the citations in respect to the more complete facts.

The actions and findings of the area arbitrator against Pete Velasquez in the above matters was tantamount to actual fraud. The area arbitrator proceeded *ex parte* in violation of Section 17.281 of the agreement and he applied Section 17.81 to Union officials contrary to the provisions of the *Labor Management Relations Act* and the clear wording of the Section. In this respect the award of the arbitrators can be set aside if it was procured by fraud or corruption. *Amicizia Societa Nav. v. Chilean Nitrate and Iodine Sales Corp.*, *supra*. The fraud need not be actual for constructive fraud is sufficient and exists where the decision was induced by such inattention or indifference so as to imply bad faith or where the decision was arbitrary or grossly erroneous. *Anthony P. Mills Inc. v. Wilmington Housing Authority*, *supra*.

The area arbitrator in proceeding *ex parte* contrary to the provisions of Section 17.281 of the agreement, and the arbitrators including Union officials in Section 17.81 contrary to the *Labor Management Relations Act* and the clear wording of the Section and Section 1.71 at the very minimum showed such an indifference or inattention as to imply bad faith, which itself is constructive fraud, even if the actions of the arbitrator were classified as a mistake, the mistake is so gross as to amount to palpable and substantial wrong which itself is fraud of a nature which voids the awards and decisions. The foregoing is supported by the court's Finding 18.K. [TR. p. 618] which found the decisions of the arbitrators to be a manifest disregard for both the contract and the law.

The area arbitrator further showed an indifference amounting to constructive fraud in that he found Velasquez guilty in case after case when the record was and is devoid of any evidence that the particular ship or ships involved were delayed, which delay is a necessary element to constitute a violation of Section 17.81 and deregistration thereunder. The coast arbitrator showed the same indifference in his review of the record and deregistration of Pete Velasquez. For these same reasons the decisions of the arbitrators not only amounted to constructive fraud but were also arbitrary, capricious and not adequately grounded in the collective bargaining agreement and should have been set aside. *International Ass'n. of Machinists v. Hayes Corporation, supra.*

In similar respect the statement of the area arbitrator, prior to arbitrating Cases No. 5 through 12, *ex parte*, that “* * * we both know Velasquez is guilty * * *.” [TR. p. 440] and then requesting Curt Johnston to at least go through the motions of a hearing, show the arbitrators state of mind to be that which strongly lends to the aforesaid fraud.

The lower Court erred in not finding and concluding that the arbitrators' decisions and opinions were made and rendered as a result of fraud and therefore setting the opinions and decisions aside.

H-4. The Arbitrators' Decisions Were Obtained by Undue Means.

The *Arbitration Act* 9 U.S.C. Section 10 (a) provides that an arbitration award may be set aside when it was procured by "undue means." The broader ground of "undue means" is itself sufficient to include many of the reasons set forth in this brief for setting the decisions of the arbitrators aside. Included in such grounds is the fact that the decisions were in manifest disregard for the law as set forth in Points D through D-4 hereof, were against public policy as set forth in Point E hereof, were a result of a connivance and conspiracy as set forth in Point I hereof, and that the area arbitrator proceeded *ex parte* as previously set forth.

The lower Court erred in not finding and concluding that the decisions of the arbitrators were procured by undue means based upon each of the above included reasons and in not therefore setting the awards aside.

The pleading of the connivance and conspiracy on the part of defendants is contained in paragraph XXI of plaintiff's amended complaint. [TR. pp. 72, 73.] The uncontroverted evidence clearly proves the connivance and conspiracy of defendants to apply Section 17.81 to union officials and thereby bring about the deregistration of Pete Velasquez. Some of the more salient facts evidencing the connivance and conspiracy are summarized in Point I of this brief.

I. The Aspects of the Present Case Are Twofold, to the Extent of the Rights of Velasquez as a Member He Was Entitled to Any and All Remedies Which May Exist by Reason of Either Arbitrary, Discriminatory or Bad Faith Conduct Which Breaches the Duty of Fair Representation.

Though as previously set forth in Points A and B hereof, a breach of the duty of fair representation as set forth in the cases of *Humphrey v. Moore supra*, and *Vaca v. Sipes, supra*, is not a necessary element for plaintiff's recovery. However, the aspects of the present case are twofold. First, plaintiff has been damaged by the arbitration award as previously set forth and is entitled to its recovery vacating and setting aside the arbitration opinions and decisions as previously set forth. Secondly, plaintiff's member, and former official, Pete Velasquez, was also personally and grievously damaged by the arbitrator's opinions and decisions as set forth in point hereof.

The arbitration was brought by defendant, P.M.A. against plaintiff, Local 13, and defendant P.M.A. proceeded *ex parte* against plaintiff, Local 13, when plaintiff, Local 13, refused to arbitrate cases 5 through 12. (Appendix I.) Local 13 had a standing in the arbitration to represent the member and vindicate his rights and had the same standing in the lower court. *International Union v. Hoosier Cardinal Corp., supra*, 383 U.S. 696.

After the Area Arbitration the matter was referred to the Joint Coast Labor Relations Committee, and the Committee referred the matter to the Coast Arbitrator which was the final stage of the grievance procedure. At this higher level it was customary that the employee and Local Union be represented by officials of the International. [Finding No. 15, 16, TR. p. 615.] The Coast Arbitrator having the power to review the prior

decision. [Sec. 17,261 Pacific Coast Longshore Agreement TR. p. 53.]

In respect to any representation given or made by the International Union before the Coast Arbitrator, any participation in or regarding the proceedings at any level, the International Union owed its duty of fair representation to plaintiff's member, Pete Velasquez. This duty of fair representation being one that is not derived from the collective bargaining agreement but implied from the Union's rights and responsibilities conferred by federal labor statutes, *Humphrey v. Moore*, *supra*, pp. 355 and 356. The same liability for breach of the members' rights also attaches to the employer, P.M.A., for its participation. *Vaca v. Sipes*, *supra*, pp. 178, 183 and 188.

In determining a Union member's rights and the extent of the statutory duty of fair representation, the court in *Vaca v. Sipes*, *supra*, at page 190, stated:

“* * * a breach of the statutory duty of fair representation occurs only when a Union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. * * *”

The elements of the duty thereby being in the disjunctive and the duty is violated if the conduct is either *arbitrary* or *discriminatory* or in *bad faith*.

Any single one of the three elements set forth in *Vaca v. Sipes*, *supra*, was sufficient to show the bad faith necessary to require the arbitration decisions and opinions be set aside. However, in the present matter, all three of the elements were present.

The court in *Vaca v. Sipes*, *supra*, at page 178, stated:

“Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or dis-

crimination *toward any*, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct.” (emphasis added.)

Among other matters, Harry Bridges’ actions in telling Velasquez in an angry manner that he, Bridges, was the only one who could save him if the matter came before the Coast Arbitrator and then telling Velasquez that he was done, through and all washed up [TR. p. 447]; Int. No. 31, TR. pp. 202, 203] taken together with Bridges acquiescing the P.M.A.’s position, before the Coast Arbitrator, that Section 17.81 applied to Union officials, when such a position was flagrantly against Union principles [Finding No. 1, TR. p. 618] and the fact that never before had Section 17.81 been applied to Union officials, though if such application was possible, which it is not, greater cause had previously existed to apply it against other officials [TR. p. 397], clearly shows the action to have been arbitrary and also discriminatory and in bad faith.

In similar respect the sacrificing of Pete Velasquez to gain the arbitration in the belly packing matter [TR. p. 424], taken with the fact that both defendants had previously jointly deregistered 81 men to get to another man, Stanley Weir, a critic of Bridges and the Pacific Coast Longshore Agreement, and deregister him [TR. pp. 449, 450], further shows the discriminatory, arbitrary and bad faith nature of the activities of the defendants. Same is important considering the joint control of registration is a manner of eliminating criticism and opposition. [TR. pp. 449, 450.]

In addition: Bill Ward, International official, who Velasquez was to oppose in running for office, stated that he would take care of Velasquez up there. [TR. pp. 409, 410 and 432.] The P.M.A. did not make a snap decision in their deregistration of Pete Velasquez, but considered it over a long period of time. [TR. p. 203.] The P.M.A.’s Agent, Mr. McEvoy, stated

that they were out to get Velasquez for what he had done as a union official as Velasquez knew the contract too well. [TR. pp. 421, 422.] Velasquez did know the contract well. During the time he administered the contract as a union official he handled the labor disputes arising under the agreement and won substantially all of them including the arbitrations. [TR. p. 397.]

The P.M.A. blacklisted Velasquez to force the matter to arbitration and attempted to bypass the grievance procedure and have the matter heard initially before the Coast Arbitrator. [TR. p. 437.] The P.M.A. proceeded *ex parte* in violation of Section 17.281 of the Agreement. In cases No. 3 and 4, the matters were carried out pursuant to prior instructions by Bridges. [TR. pp. 419, 421; TR. pp. 416, 418.] In other cases, Velasquez was following the instructions of the Area Arbitrator, and many of the cases involved situations created by defendant P.M.A. which ultimately resulted in the discharge of employees by P.M.A. under questionable circumstances. (Appendix V.)

The opinions and decisions of the arbitrators manifestly disregarded the law and the collective bargaining agreement. [Finding No. 18 K, TR. p. 618] and both defendants had jointly engaged in a long course of conduct in harrassing plaintiff and its members. [TR. pp. 437, 438; TR. p. 410.] The Area Arbitrator announced Velasquez' guilt, even before proceedings *ex parte* [TR. p. 440] and later suggested a deal could possibly be made to re-register Velasquez if he would agree not to run for office again. [TR. pp. 434, 444.]

A more complete summary of the evidence sustaining the foregoing and the citations to the more complete statement of the facts is set forth in Appendix VI. The above matters, though only part of the matters set forth in the affidavits and answers to interrogatories, were more than ample to carry the matter to trial on the

issue of the breach of “fair representation” and to establish the breach of duty.

The lower court erred in not finding and concluding that the actions of defendant were arbitrary, discriminatory and in bad faith and were a breach of the duty of fair representation and therefore setting the arbitrator’s opinions and decisions aside.

The lower court further erred in its Finding No. 19 which in substance finds any allegations inconsistent with the court’s findings of fact to be untrue [TR. pp. 618, 619], and finding being in error as not supported by and contrary to the evidence and in substance finding that the duty of fair representation had not been breach and arbitrary, discriminatory and bad faith conduct had not taken place.

The lower court further erred in its conclusions Numbered III and IV and the subdivisions thereof [TR. pp. 619, 636], in that said conclusions which conclude that there was no breach of the duty of fair representation or arbitrary, discriminatory or bad faith conduct are not supported by the facts or the law and are contrary to the facts, the law and the express findings of the court.

J. The Lower Court Erred in Its Conclusion No. IV Which Is Contrary to Both Fact and Law and More Particularly in Its Conclusion No. IV-K.

The court’s Conclusion No. IV involves eleven subdivisions commencing with A. and terminating with K. [TR. pp. 624, 639.] The conclusion is interspersed with factual matters, reasoning, argument and legal authority, however, the substance and effect of the conclusion is contained in the headings of each subdivision and provides as follows:

“The ILWU did not breach its duty of fair representation * * *”

As set forth in Points A and B of the argument herein, the duty of fair representation as referred to by the courts in such cases as *Humphrey v. Moore, supra*, and *Vaca v. Sipes, supra*, has no application in respect to the setting aside an arbitration award by one who is a party to the award. Among other reasons is that the right to arbitrate arises from the Collective Bargaining Agreement and the employer Union relationship. *Woody v. Sterling Aluminum Product, Inc., supra*. On the other hand, the duty of fair representation arises from statutory labor laws, not the Collective Bargaining Agreement, and is enforced by and on behalf of, a union member who is not a party to the agreement. *Vaca v. Sipes, supra; Humphrey v. Moore, supra*.

To the extent which plaintiff herein seeks recovery on its behalf, based upon an arbitration had against plaintiff, the matter arises out of the Collective Bargaining Agreement, and plaintiff is entitled to the grounds for relief heretofore set forth and as are provided by the *Arbitration Act 9 U.S.C., Section 10. General Electric Co. v. Local 20 United Electrical Radio and Machine Workers of America, supra*. Therefore, the conclusion is in error and one not supported by the record and the judgment rendered thereon is also in error and should be vacated and reversed.

In respect to the extent that the connivance and conspiracy between defendants affected the individual rights of plaintiff's member, as set forth in Point I hereof, "the duty of fair representation" was applicable.

The error in conclusion No. IV-K, is patent within the conclusion which provides [TR. p. 636] :

"K. The claim that the award is in manifest disregard of the collective bargaining agreement and the law does not raise any breach of ILWU's duty of fair representation.

It is well settled that where the parties to a collective bargaining contract have agreed to submit their disputes to final and binding arbitration, courts will not review the merits of any controversy so decided. Particularly the court will not rehear or reweigh the evidence offered at the arbitration hearing. Nor will the court substitute its interpretation of the collective bargaining contract for that of the arbitrator. These principles have been stated by the United States Supreme Court in, *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)."

First, the cases *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) do not concern and have no application in respect to the duty of fair representation as set forth by the cases of *Humphrey v. Moore*, *supra*, and *Vaca v. Sipes*, *supra*.

Secondly, the above cases cited by the court are not in point in respect to the present case and the principles for which the cases are cited. When viewed in context with their facts and holdings the cases, do not either limit or bar the recovery sought by plaintiff in the lower court.

In the case of *United Steelworkers of America v. American Manufacturing Co.*, *supra*, the Collective Bargaining Agreement provided for arbitration of all disputes between the parties "as to the meaning, interpretation and application of the provisions of the agreement." The suit was brought to compel arbitration and the lower court granted summary judgment holding that the grievance was not arbitrable, based upon

the premise that the alleged grievance was not meritorious. In reversing the District and Appellate Courts, the Supreme Court, at pages 567 and 568, stated:

“The function of the court is very limited when the parties have agreed to submit *all questions of contract interpretation to the arbitrator * * **” (emphasis added.)

“The courts, therefore, have no business weighing the merits of the grievance, * * *”,

and at page 569, stated:

“There was, therefore, a dispute between the parties as to the meaning interpretation and application of the Collective Bargaining Agreement. Arbitration should have been ordered. * * *”

The case of *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra*, was also a case to compel arbitration. The lower court took evidence going into the merits of the grievance and held that the grievance was not arbitrable. In reversing the lower courts the Supreme Court, at page 583, stated:

“For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit to. * * *”

“The grievance alleged that the contracting out was a violation of the Collective Bargaining Agreement. There was therefore a dispute ‘as to the meaning and application of the provisions of this agreement’ which the parties had agreed would be determined by arbitration.”

The case of *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, *supra*, is the only one of the three cases which approaches being in point. The court ordered arbitration, arbitration was had and the Union moved for enforcement of its award. The Dis-

strict Court ordered compliance and the Circuit Court held the award unenforceable. The arbitration provisions provided "that any differences 'as to the meaning and application' of the agreement should be submitted to arbitration and that the arbitrator's decision shall be final and binding on the parties." At page 596 the court held that the refusal of the courts to review the merits of an award was a proper approach, and at page 597, stated:

"Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse the enforcement of the award."

Neither *United Steelworkers v. American Manufacturing Co.*, *supra*, or *United Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*, involved a determination in respect to arbitrator's decision. However, *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*, did involve such a determination. There was nothing in the *Enterprise* case, *supra*, which in any way limited the relief granted by the *Arbitration Act*, 9 U.S.C., Section 10. In fact even though in the *Enterprise* case, *supra*, the arbitration agreement was extremely liberal and provided that the arbitrator should decide any differences "as to the meaning and application" of the agreement and the award shall be "final and binding." The court set forth therein limitations on the arbitrator's powers. These limitations being consistent with those provided by the *Arbitration Act*, 9 U.S.C., Section 10.

In the *Enterprise* case, *supra*, the arbitration provisions were liberal, and in the present case the arbitration provisions are extremely limited. In the present case, both Section 17.52 and 17.62 of the agreement provide that the “powers of arbitrator shall be limited strictly to the application and interpretation of the agreement as written,” and Section 17.53 provides that the decision must be based upon a showing of facts and their application under specific provisions of the written agreement. Section 22.1 provides that no *provision* or *term* of the agreement may be amended, altered, modified or waived without an agreement in writing signed by the parties. In the foregoing cases the functions of the court were limited by the liberal provisions of the arbitration agreement, in the present case they are not. *United Steelworkers of America v. American Manufacturing Co.*, *supra*, at page 567.

The distinction between the *Enterprise* and present case being that in the *Enterprise* case, *supra*, the arbitrator had more leeway before he exceeded his powers; whereas, in the present case the arbitrator was severely restricted to where the interpretation became one of law and the arbitrator had no discretion in his interpretation and exceeded his powers when he failed to interpret the contract as written and in accordance with the law. Consequently, Finding No. 18-K and Conclusion No. IV-K in respect to the awards being a “manifest disregard for the Collective Bargaining Agreement and the law” patently shows the error of Conclusion No. IV and in themselves require a reversal of the judgment. The very wording of the Finding and Conclusion show that the arbitrators exceeded their powers and dispensed their own brand of industrial justice in disregard for both the law and the Collective Bargaining Agreement “as written.” The very wording of the Finding and Conclusions compels the reversal of the

judgment in favor of defendants and compels judgment in favor of plaintiff.

K. The Lower Court Erred in Its Conclusion Number II Which Is Contrary to Both Fact and Law.

The lower court's Conclusion No. 2 is set forth at page 14 of its "Decision". [TR. p. 619.] Said conclusion provides:

"The award of the Coast Arbitrator, the award of the Area Arbitrator, as well as the decisions rendered throughout all stages of the grievance machinery were and are in complete accordance with the terms of the collective bargaining agreement between employer and union, 'Pacific Coast Longshore Agreement, 1961-1966,' particularly the terms governing the grievance-arbitration procedure.

Each award and decision, 'reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is.' *Humphrey v. Moore*, 375 U.S. 335, 351 (1964) relying upon *Drivers Union v. Rose & Co.*, 372 U.S. 517, 519 (1963)."

Said conclusion is in error in that as previously set forth the Area Arbitrator and the P.M.A. proceeded to arbitrate cases 5 through 12 *ex parte* in violation of Section 17.281 of the Collective Bargaining Agreement. The conclusion is further in error in that the arbitrators awards and decisions are contrary to the facts and a manifest disregard for the law and the Collective Bargaining Agreement, being violative of both the Labor Management Relations Act and the Collective Bargaining Agreement as set forth in Points D, D-1, D-2, D-3, D-4 and D-5 hereof and violative of public

policy for the same reasons as is set out in Point F. hereof. In this regard, and in support of plaintiff's position, the lower court found that the decisions and awards were a "manifest" disregard for both the law and the Collective Bargaining Agreement. [Finding No. 18-K, TR. p. 618.]

In similar respect the conclusion disregards and is contrary to the provisions of the *Arbitration Act*, 29 U.S.C., Sec. 10 and the grounds for relief provided and sought thereunder. Plaintiff pled and proved its grounds for relief under the Arbitration Act and public policy. The grounds for such relief and the pleading and facts in support thereof, are fully set forth in Points H, H-1, H-2, H-3, H-4 and H-5 of this brief.

The court further erred in its conclusion that the awards were "final and binding upon the parties." The error of such conclusion is set forth in Point G of this brief, which clearly sets forth the reasons why an arbitration award which by its terms may provide that it is "final and binding" is not final or binding in respect to the right to have said award set aside under the provisions of the Arbitration Act or as being against public policy or a manifest disregard for the law.

In its conclusion the lower court erred by continuing with its assumption that plaintiff could only seek relief for a violation of "the duty of fair representation" as set forth by the case of *Humphrey v. Moore, supra*. As set forth in Points A. and B. hereof, said duty was not plaintiff's primary remedy for setting the arbitrator's decision and opinions aside. However, as set forth in Point I hereof, in respect to plaintiff's right to urge the remedies of its member, Pete Velasquez, the duty of fair representation was an issue and proved by uncontroverted evidence. Therefore, the lower court further erred in its Conclusion No. II.

L. The Lower Court Erred in Its Conclusion Numbered III Which Is Contrary to Both Fact and Law.

Conclusion No. III is contained in pages numbered 14 to 19 of the lower court's decision. [TR. pp. 619-624.] The conclusion is basically a repetition of the lower court's Conclusion numbered II with citation of authority and argument in support thereof. For each of the same reasons set forth in Point K hereof, in respect to Conclusion numbered II, the lower court further erred in its Conclusion numbered III.

The lower court in its Conclusion No. III, continued [TR. p. 623]:

“Nowhere in the record can we find any support for plaintiff's attack upon the integrity of the ILWU and of the procedures which led to the Coast Arbitrator's award and the Area Arbitrator's award, * * * Nowhere is there a factual statement, claim or allegation of fraud, deceitful action or dishonest conduct.”

Whether the foregoing be either a conclusion or finding same is in error. Plaintiff, in paragraph XXI of its amended complaint [TR. pp. 72, 73], alleged fraud, corruption, evident partiality, undue means, excess of powers, indifference and manifest disregard for the facts and grossly erroneous findings and conclusions of facts, together with the connivance and conspiracy of the defendants to bring about the aforesaid acts and the deregistration of Pete Velasquez. In paragraph VI of the second cause of action [TR. pp. 75, 76] plaintiff alleged the laws and public policy which the awards were violative of.

Plaintiff fully proved the foregoing allegations by uncontroverted evidence. A summary of the evidence supporting the connivance and conspiracy is contained in Point I hereof, with a more complete summary to-

gether with the evidence references being contained in Appendix VI of this brief. Further, Appendix V hereof sets forth a summary of cases 5 through 12, as part of the connivance and conspiracy and evidencing how defendants and the Area Arbitrator contrived and created the situations which brought about the complaints against Pete Velasquez. The evidence clearly shows fraud, deceit and dishonest conduct.

The conclusion continues [TR. p. 624]:

“The record does show that the ILWU fought on behalf of Velasquez and Local 13 against PMA in the five steps of the grievance procedure vigorously and at times even vituperatively, but always valorously and valiantly.”

Whether the foregoing is a conclusion or finding same is in error as not being supported by the evidence or other findings and being contrary to the facts.

The record does show that the International appeared at one Area Labor Relations Meeting, however, it is devoid of any support given to Local 13, in fact the contrary was shown. [TR. p. 437, par. 20; TR. pp. 24-29.] The record shows that International President, Harry Bridges, told Velasquez that he, Bridges, was the only one who could save him before the Coast Arbitrator and then told Velasquez that he was done, through and all washed up. [TR. p. 447, par. 46.] Bridges then went before the Coast Arbitrator and acquiesced in the P.M.A.'s position that Section 17.81 of the agreement applied to union officials. [TR. p. 447, par. 46.] Bridge's action resulted in an award which was “flagrantly against union principles” [Finding No. I, TR. p. 618] and a “manifest” disregard for both the Collective Bargaining Agreement and the law. [Finding No. 18 K, TR. p. 618.]

Bridges explained his actions by stating that “they” had to sacrifice Velasquez to gain the belly packing is-

sue, an award which was handed down by the Coast Arbitrator on the same day. [TR. p. 424.] The record does not evidence any fight by the International on behalf of plaintiff, Local 13, but does disclose a long course of conduct on behalf of the International President, Harry Bridges, in lending support and assistance to the P.M.A. in its harassment and coercion of plaintiff Local 13, and its members. [TR. p. 448, par. 47; TR. p. 438, par. 22; TR. p. 450, par. 55.]

M. The Lower Court Erred in Its Conclusion Numbered V Which Is Contrary to Both Fact and Law.

The lower court's Conclusion Numbered V is found at page 34 of the Court's decision and page 639 of the transcript and provides as follows:

"There is no genuine issue as to any fact material to the amended complaint herein. The amended complaint and each and every cause of action therein alleged fails to state a claim upon which relief can be granted. Plaintiff is not entitled to any relief under or by virtue to any order or judgment setting aside or vacating the Coast Arbitrator's award dated June 29, 1965, or the Area Arbitrator's award dated February 13, 1965, or either of them."

Conclusion No. V is in error in that it is not supported by the fact or the law. Defendants did not offer any affidavits or evidence in support of its motion for summary judgment and made and based their motion upon "the records, pleadings, papers and documents," previously filed in the action. [TR. pp. 330, 331.] Prior to making its Conclusion No. V the court made nineteen (19) Findings. Finding Numbered 19 provides [TR. pp. 618-619]:

"The allegations contained in Local 13's amended complaint, to the extent that they are inconsistent with the findings of fact herein, are untrue."

The burden was on the defendants to show that there was no material issue of fact, that they were entitled to judgment as a matter of law and it was incumbent upon the defendants to show through specific facts that no issue existed. *Fowler v. Southern Bell Telephone & Telegraph Company*, (5th Cir. 1965) 343 F. 2d 150, 153. In bearing their burden defendants must produce affidavits or competent matter to overcome the allegations of the complaint. *F. S. Bower Electric Co. v. J. D. Hedin Construction Co.*, (D.C. Cir. 1963) 316 F. 2d 362, 365. Defendants showing must be complete as to all the issues raised by the pleadings. *Union Insurance Soc. of Canton, Ltd. v. William Gluckin & Co.*, (2d Cir. 1965) 363 F. 2d 946, 953.

In similar respect the evidence must be looked at in the light most favorable to the opposing party and the summary procedure should be used sparingly in complex matters or where motive and intent play leading roles and the proof is largely in the hands of alleged conspirators and hostile witnesses. *Poller v. Columbia Broadcasting System*, (1962) 368 U.S. 464, 473, 82 S. Ct. 486. There must be conclusive evidence supporting the movants theory whereby the movant is entitled to judgment as a matter of law. *Poller v. Columbia*, *supra*, pp. 467 and 473.

What the lower court did was to proceed without proof being introduced by defendants and find the allegations of plaintiff's complaint not to be true and granted summary judgment in favor of defendants. The lower court instead of determining whether there was an issue of fact remaining to be tried actually decided the issues of fact instead of leaving such issues to be determined at a trial. Such a procedure was improper. *Union Insurance Soc. of Canton, Ltd. v. William Gluckin & Co.*, *supra*, pp. 951, 952.

Plaintiff was entitled to relief under the provisions of the *Arbitration Act*, 9 U.S.C., Sec. 10. *General Electric Company v. Local 205 United Electrical Radio and Machine Workers of America*, *supra*, p. 548. Plaintiff alleged facts in its first cause of action to obtain such relief. [TR. pp. 72, 73.] Plaintiff was entitled relief upon the grounds that the decisions of the Arbitrators were contrary to public policy and the Labor Management Relations Act. *Local 45, International Union of Electrical Radio and Machine Workers, A.F.L.-C.I.O. v. Otis Elevator*, *supra*. Plaintiff alleged facts in its second cause of action to obtain such relief. [TR. pp. 75, 76.]

In their motion for summary judgment defendants did not set forth facts evidencing that plaintiff was not entitled to such relief. However, plaintiff, in opposition to the motion for summary judgment has set forth uncontroverted facts which clearly show that plaintiff was entitled to relief on both his first and second causes of action. Said facts in relation to the arbitrators decisions being a manifest disregard for the law and a violation of public policy being set forth in Points D-2, D-3, D-4, D-5, and F. hereof. The facts evidencing plaintiff's right to relief under the Arbitration Act and pled in plaintiff's first cause of action are set forth in Points H-1, H-2, H-3, and H-4 hereof with the evidence in respect to defendants connivance and conspiracy being set forth in Point I hereof and Appendix VI and V.

The lower court erred in concluding that the complaint failed to state a claim upon which relief can be granted.

O. The Lower Court Erred in Its Conclusion Numbered VI Which Is Contrary to Both Fact and Law.

Conclusion Number VI is contained on page 34 of the lower court's "decision" and provides as follows [TR. p. 639]:

"There is no genuine issue as to any fact material to the cross-claim and counter-claim. Defendant, Cross-Claimant and Counter-Claimant Pacific Maritime Association is entitled to relief under and by virtue of the cross-claim and counter-claim and, in particular, is entitled to an order and judgment confirming and enforcing the Coast Arbitrator's award dated June 29, 1963."

Plaintiff answered defendants counter-claim and in substance set up as a defense to the attempted enforcement and confirmation of the arbitrators decisions, the same grounds as plaintiff alleged for setting aside and vacating the decisions. [TR. pp. 293, 294.] The argument, facts and matters set forth in Point M hereof as the reasons why the lower court erred in its Conclusion Number V, and each of them, are applicable to the reasons why the lower court erred in its Conclusion Number VI.

That for brevity, the argument, matters and reasons set forth in Point M. are incorporated herein by reference thereto. That for each of said matters and reasons the lower court erred in its Conclusion Number VI and in concluding that the Coast Arbitrator's award should be confirmed and enforced.

P. The Lower Court Erred in Its Finding Number 18 and the Subdivisions Thereof and Therefore Consequently Erred in Its Conclusion Numbered IV and the Subdivisions Thereof.

The lower court's Finding Number 18 and its eleven (11) subdivisions are set forth on pages 11 through 13

of the lower court's decision. [TR. pp. 616-618.] Finding No. 18 provides as follows:

“Local 13 has asserted that the ILWU acted arbitrarily, discriminatorily and in bad faith in processing the Velasquez grievance. More specifically, it contends that this conclusion is warranted on the basis of the following factual claims which the court, taking all facts in the light most favorable to plaintiff and for the purpose of ruling upon the motion for summary judgment, assumes to be and finds to be true:”

Finding No. 18 continues with eleven (11) subdivisions which set out certain facts as being found. The court then subsequently in its Conclusion numbered IV, and the eleven (11) subdivisions of the conclusion, concludes separately as to each of the facts found in the eleven (11) subdivisions of Finding No. 18 and as each fact separately concludes that the corresponding Finding was not a breach of the duty of “fair representation.” However, the lower court did not find on all of the facts or find on the facts in a light most favorable to plaintiff. [TR. pp. 624-636.]

In considering a motion for summary judgment the evidence must be viewed in the light most favorable to the litigant opposing the motion. *Poller v. Columbia Broadcasting System, supra*, p. 473. In Finding No. 18 and the subdivisions thereof, the lower court did not view the evidence in a light most favorable to plaintiff for said findings are partial facts detached from their meaningful portions and set forth in a manner as to reduce their effectiveness and detract from their full meaning and effect. The lower court did not find upon all of the facts but found upon a portion of the facts separating them from the stronger facts which gave effect to the connivance and conspiracy.

The facts which prove that defendants were in bad faith and their actions were arbitrary and discriminatory are summarized in Point I and Appendix VI hereof. A summary of cases 5 through 12 which evidence the minor nature of the matters and the Area Arbitrator's and the defendants activities in creating the situations leading to the alleged complaints involved is set forth in Appendix V.

The lower court erred in failing to view the evidence in the light most favorable to plaintiff and find accordingly. Therefore, the conclusions set forth in Conclusion IV and the subdivisions thereof, and each of them, are also in error as being contrary to and not supported by the facts.

Further, the lower court erred in not determining whether there was an issue and in so determining leaving the issue for trial. Instead the lower court proceeded to decide the issues and erred.

Q. The Lower Court Erred in Its Finding No. 19. Said Finding Being Contrary to Both Fact and Law and Not Supported by Evidence.

The lower court's finding Numbered 19 is contained in pages 13 and 14 of the lower court's "Decision" and provides [TR. pp. 618-619]:

"The allegations contained in Local 13's amended complaint, to the extent that they are inconsistent with the findings of fact herein, are untrue."

Instead of searching the record to determine whether there were issues of fact to be tried the lower court decided the issues by finding the allegations untrue. In doing so, the lower court erred and should have left the issues for trial. *Empire Electronics Co. v. United States*, (2d Cir. 1962) 311 F. 2d 175, 179, 180.

In substance without support of evidence and with the contrary facts shown, the effect of the court's Finding numbered 19 was to find as follows: The decisions of the arbitrators was not a discharge for union activities, contrary to Sections 7 and 8 (a)(1) of the L.M.R.A. as was set forth and supported in Point D-2 hereof. The decisions of the arbitrators were not a means for the employer to dominate and coerce plaintiff and interfere with the administrative of plaintiff local and deprive plaintiff's member of representation of their own choosing contrary to Sections 7 and 8(a)(1) and 2 of the L.M.R.A., as set forth and supported in Point D-3 hereof. The decisions of the arbitrators was not an award of damages against a union official contrary to the provisions of the L.M.R.A., as set forth and supported by Point D-4 hereof. The decisions of the arbitrators were not contrary to public policy and the national labor policy as set forth and supported by Point-F. hereof.

Each of the above matters were matters which arose from the allegations of plaintiff's second cause of action. [TR. pp. 75, 76.] In similar respect, plaintiff's first cause of action provided other and further allegations for setting the decisions of the arbitrators aside as provided by the *Arbitration Act*, 9 U.S.C., Sec. 10. [TR. pp. 73, 74.] Each of these allegations were set forth and supported in Points H-1, H-2, H-3 and H-4 hereof. Without support in the evidence and contrary to the evidence submitted the lower court by its Finding numbered 19 found each of said allegations and matters untrue.

The lower court erred grievously in its Finding numbered 19 and its decisions should therefore be reversed in its entirety.

Conclusion.

For each and all of the reasons set forth herein this Honorable Court should reverse the judgment of the lower court which granted summary judgment against plaintiff and appellant and in favor of defendant and appellee, Pacific Maritime Association, and which dismissed the amended complaint on the merits, confirming and enforcing the opinions and decision of the Coast Arbitrator, Sam Kagel. That this Honorable Court should reverse said judgment in its entirety and remand the matter with directions that judgment be entered vacating and setting aside the opinions and decisions of the Area and Coast Arbitrator which are invalid and void as a matter of law or in the alternative said matter be remanded for trial on the issues.

Respectfully submitted,

KENNETH W. GALE,

Attorney for Appellant, International Longshoremen's and Warehousemen's Union, Local 13.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KENNETH W. GALE

Appendix I—Decision and Opinion of Area Arbitrator, Germain Bulcke.

Appendix II—Decision and Opinion of Coast Arbitrator, Sam Kagel.

Appendix III—Evidence re: sole employment of Velasquez.

Appendix IV—Evidence re: coercive effect of arbitrators opinions and decisions upon Local 13 and membership.

Appendix V—Cases under which Velasquez was found guilty.

Appendix VI—Evidence re: connivance, conspiracy, fraud, corruption undue means.

Appendix VII—List of exhibits.

Appendix I—Decision and Opinion of Area Arbitrator, Germain Bulcke.

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Appendix V—Cases under which Velasquez was found guilty.

Appendix VI—Evidence re: connivance, conspiracy, fraud, corruption undue means.

Appendix VII—List of exhibits.

APPENDIX I.

Opinion and Decision of Germain Bulcke, Area Arbitrator, Wilmington, California, February 12, 1965.

In Arbitration Proceedings Pursuant to Current Pacific Coast Longshore Agreement.

In the Matter of a Controversy Between Pacific Maritime Association, Complainant, and International Longshoremen's and Warehousemen's Union, Local 13, Respondent. #5-65.

ISSUE: Employers' Complaints Filed Against Pete Velasquez, #3449, (New No. 31090) Claiming Violations of Current Agreement.

These hearings were held in the P.M.A. Conference Room on January 4, 5, 6, 1965, in accordance with an agreement reached at the Joint Area L.R.C. Meeting #12-64, dated December 14, 1964. Appearances are recorded in the transcript.

The Minutes of the Joint Area L.R.C. Meeting #12-64 dated December 14, 1964, record that, "The Employers requested that a Court Reporter be utilized for a transcript of the hearings on complaints filed against P. Velasquez, #3349, which involve the Employer motion for his deregistration. Union held this request in abeyance."

At the beginning of this hearing, the Union stated that they did not believe a transcript should be made.

The Employers' position was that the dispute was of general significance (Section 17.64); that the formal procedure would be necessary to settle the issue, and a transcript should be made.

The Arbitrator sustained the Employers' position, and a full and complete record of the proceedings was made by a Certified Shorthand Reporter.

It should be noted that shortly before the conclusion of the first day's session (January 4) the Union stated that, "Local #13 will not participate in any arbitrations in regard to Mr. Velasquez as he was employed as a Business Agent of the night side, representing Local #13 as an independent Business Agent, and we are not going to participate in arbitrations regarding these complaints." (Tr. P. 121)

The Employers then stated, "Under these circumstances, the Employers have no choice but to insist that in view of the flat refusal of the Union to participate in any further hearings of these disputes, that these hearings be continued on an ex parte basis." (TR. P. 125-126)

During the second day's hearing (January 5), Mr. MacEvoy for the Employers, stated, "We would then have to ask the arbitrator to rule as to whether or not he will hear these cases ex parte. I believe that Section 17.61 is here involved." (TR. P. 170.)

The Arbitrator ruled that in accordance with the provisions of Section 17.61, these hearings would be continued on an ex parte basis. (TR. P. 171, 172) Thus, the remaining 8 Employer complaints were heard on an *ex parte* basis.

It was agreed and understood that any findings made by the Arbitrator based on the complaints, testimony, and the record made in these hearings will deal only with Pete Velasquez and not with any other person or persons or gangs that may be named as being involved in the same situation. (TR. P. 202-203)

CASE #1

Involves Employer Complaint #212, Minutes of Joint L.R.C. Meeting #129-64, dated August 26, 1964, Item #14 - Page 5, record as follows:

“E.C. #212 - P. VELASQUEZ, #3349, F. PATRICIO, #2993 - REFUSAL TO WORK AS DIRECTED - S.S. GERINA, BERTH #231 - 7/11/64 - CRESCENT WHARF & WAREHOUSE COMPANY.

Messrs. Velasquez and Patricio, deckmen in M.U. #1 in #3 Hatch, were directed to work extended time to finish and sail vessel. They called replacements at 3:00 A.M., without sufficient reason. Their replacements arrived at 3:15 A.M., but were not accepted by the Employer. The men left the job, resulting in loss of the gang because of insufficient men to continue work. Disagreement reached.”

Minutes of Joint L.R.C. Special Meeting #152-64, dated October 1, 1964, record that E.C. #212 was discussed; no agreement reached, and the complaint referred to the Area L.R.C. for disposition.

Minutes of Joint Area L.R.C. #12-64, dated December 14, 1964, record that disagreement was reached and the Employers referred the complaint to arbitration.

OPINION AND DECISION:

Having carefully studied the lengthy record made (TR. P. 3-34), it is the Arbitrator's decision that Pete Velasquez had a reasonable and bona fide purpose for leaving the job and replacing himself at 3:00 A.M., and is not guilty of refusing to work as directed as claimed in E.C. #212.

CASE #2

The Employers submitted copies of Minutes of the Joint L.R.C. Meetings #35-59, dated April 7, 1959, and Joint L.R.C. #41-62, dated April 11, 1962.

Minutes #35-59 record the following:

“Sp. E.C. #61 complaint by West Coast Terminals against P. M. Velasquez, #3349, working aboard the S.S. JAPAN BEAR during the night shift of February 19, 1959. The complaint states that Pete Velasquez failed to show back on the job at 11:00 P.M., following the evening meal period. The remainder of the gang would not work with a replacement, and quit. *Disposition*: #3349 was reprimanded by the Union and instructed to report to future jobs on time.”

Minutes #41-62 record the following:

“E.C. #386. This complaint was filed by Associated-Banning Co. against the Union business agent for violation of Section 16(B) of the Basic Longshore Agreement and the August 25, 1960 Settlement Document.” The complaint states that the Union business agent boarded the S.S. LOCH LOYAL at Berth 190 on September 11, 1960 without notifying company supervision that he was on the job. The Committee agreed the contract provision must be complied with. The provision states that: “In order that the Employer may cooperate with the business agent in the settlement of disputes, the business agent shall notify the representatives designated by the Employers before going on the job.”

“The Committee agreed that on the basis of this understanding, the complaint is resolved.”

OPINION AND DECISION:

The record shows that the purpose for the introduction by the Employers of the Minutes of L.R.C. recording the disposition of the complaints filed against Pete Velasquez as a part of his work record, was to establish the Employer's contention that he is a continuous and repeated offender.

It is the Arbitrator's opinion and decision that the Minutes of the L.R.C. clearly record that the Joint L.R.C. Committee had agreed that Pete Velasquez had been found to have violated the provisions of the Longshore Coast Agreement and as such it becomes part of his work record. However, the disposition by the Joint L.R.C. on the complaints filed in 1959 and 1960 do not sufficiently support the Employers' contention that Pete Velasquez is a continuous and repeated offender.

CASE #3

E.C. #373 - Minutes of Joint L.R.C. Meeting #194-64, dated December 3, 1964, record the following:

"E.C. #373 - U.C. #634 - GANG #44 - REFUSAL TO WORK AS DIRECTED - S.S. PRESIDENT QUEZON, BERTH #144-12/1/64, MARINE TERMINALS CORP.

The Employer complaint states that: Gang #55 was turned to at 6:00 P.M. on the PRESIDENT QUEZON and assigned to work in #4 hatch. They refused to work this hatch, demanding that the midshift boom be given a static test, due to the fact that the day gang had dropped the boom at approximately 8:00 A.M. that morning. Gang #55 was shifted to #6 hatch while a Special L.R.C.

Meeting was held to discuss the validity of the gang's claim that the gear was unsafe to work. After the committee had reached disagreement with respect to the safety of the operation, an arbitration was held. The Arbitrator ruled that the boom was not unsafe and the men were to run to and work as directed by supervision. The men were directed to turn to at 11:00 P.M. and refused, resulting in each man being fired for refusing to abide by the Arbitrator's decision to work #4 hatch as directed by supervision, thereby creating a work stoppage and delaying the departure of the vessel.

Disagreement reached, and referred to Area L.R.C."

Minutes of Joint Area L.R.C. #12-64 dated December 14, 15, 1964 record that disagreement was reached on E.C. #373 - U.C. #634, and following disagreement, the Employers referred complaint to arbitration.

OPINION AND DECISION:

The position and contentions of the parties regarding the above noted complaints was discussed at great length during these hearings (TR. P. 66-118). Having considered the record made, it is the Arbitrator's decision that Pete Velasquez by his actions *did violate* Sections 11.21, 11.31, 17.82 and 18.1 of the Current Agreement.

CASE #4

E.C. #363 - IMPROPER ORDERING OF REPLACEMENTS - S.S. MICHIGAN 11/23/64 - CRESCENT WHARF & WAREHOUSE COMPANY.

The Minutes of Special L.R.C. #189-64 record that the issue was discussed but no agreement reached.

The Minutes of the Joint Area L.R.C. record that disagreement was reached on E.C. #363, and following disagreement the Employers referred the complaint to arbitration; also, following discussion of several tentative dates, the committee agreed that an arbitration hearing would be scheduled starting at 10:00 A.M. Monday, January 4, 1965. *At this hearing*, January 4, 1965, it was stated that the above noted minutes had not been signed. The parties, in accordance with a suggestion made by the Arbitrator, held a meeting on the morning of January 5, in order to get minutes acceptable to both sides. They were not successful. The following statement was made by Mr. MacEvoy for the Employer: "It is unfortunate that the parties were unable to reach agreement on the minutes, the draft minutes of meeting of November 24, but we believe that the case can be heard on the basis of a stipulation by both parties that the case has been heard at the local level and has been heard at the Area level on December 14, and the Employers would offer this stipulation if the Union is willing to so stipulate."

Mr. Johnston: "All right." (TR. P. 130-131)

The Employers stated that, "In the case of the S.S. MICHIGAN, we have an Employer complaint, E.C. #363, filed by Crescent Wharf & Warehouse Company, dated November 24, 1964, involving a dispute on the S.S. MICHIGAN at Berth Long Beach 4. The complaint states, after listing

the names and work numbers and categories of the men in Ship Gang #55, including hatch tender, winch driver, four holdmen, four swingmen and two frontmen: 'The above men were directed to work extended time to finish the vessel for sailing. They all called replacements for 3:00 A.M. The replacements were not accepted by the Employer and the above men refused to continue work and walked off the job.' (TR. P. 131)

"It is the Employers' contention that this gang, acting in concert, with Mr. Velasquez as winch driver and steward, deliberately refused to work beyond 3:00 A.M., in violation of Section 3.146, and Section 11 and deliberately created a work stoppage aboard the vessel." (TR. P. 136)

OPINION AND DECISION:

The above case. E.C. 363, was discussed at great length (TR. P. 131-170). The Arbitrator noted that a copy of a letter was submitted by Mr. Velasquez as the reason why he deemed it necessary to replace himself at 3:00 A.M. The letter reads as follows:

"Dear Sirs: This is to verify that Mr. and Mrs. Pedro Velasquez had an appointment with me on November 24, 1964, at 9:00 A.M. This appointment was made November 22, 1964, and was kept by Mr. and Mrs. Velasquez. Sincerely yours, Roy Shaw, Real Estate, Donald W. Shaw. Dated December 10, 1964." (TR. P. 141)

The record, however, clearly shows that the gang, including P. Velasquez, had taken the position that they did not intend to work extended time, but would only work to fulfill the eight-hour guarantee.

The contention of the Employers that this gang, acting in concert, with Mr. Velsasquez as winch driver and steward, deliberately refused to work beyond 3:00 A.M. in violation of Section 3.142, and Section 11, and deliberately created a work stoppage, is sustained.

It must be noted that all the remaining cases were heard *on an ex parte basis*.

CASE #5

“E.C. #196 - REFUSAL TO WORK AS DIRECTED - S.S. KOREAN BEAR BERTH S.P. 91, S.S. PRESIDENT HAYES, BERTH S.P. 93-B 8/4/63—ASSOCIATED BANNING COMPANY.

Minutes of Joint L.R.C. Sp. Meeting #192-63, November 12, 1963, record that disagreement was reached and the complaint referred to Area L.R.C. Minutes of the Area L.R.C. Meeting #2-64, February 21, 1964, on E.C. #196, record that:

“The Committee agreed that in accordance with Section 3.143, men and/or gangs may be ordered to shift from a job or ship where they have not completed their original assignment to permit a late start on another job or ship or in order to fill out the 8-hour guarantee, or in order to finish the second ship for shifting or sailing. The Committee also agreed that the men involved in this complaint were obligated to shift to the S.S. PRESIDENT HAYES for working an extended shift in order to finish this vessel for sailing.

“Employers moved that the business agent, Pete Velasquez, violated the contract and the August

25, 1960 Settlement Document, Paragraph 4(d) by improperly directing the men to leave the job, thereby precipitating the work stoppage on this job. The Employers moved that the four men involved, and the Union business agent, Pete Velasquez, be assessed the penalty of five days off all work with 40 hours added to their check-in time. "The Union disagreed with the Employers' motion, stating it was their understanding the four men involved in this complaint were innocent victims of circumstances. Union stated a thorough investigation revealed that the men followed erroneous instructions.

"Following disagreement the dispute was referred to the Area Arbitrator for decision."

OPINION AND DECISION:

The record clearly shows that the Area L.R.C. agreed that the four men involved should have shifted and worked to finish the second ship for sailing, and did violate Section 3.143. The statement by the Union that the men followed erroneous instructions issued by the business agent fully support the Employers' contention that the business agent improperly directed the men to leave the job, resulting in a work stoppage. The Employers' motion that "The business agent, Pete Velasquez, violated the contract and the August 25, 1960 Settlement Agreement, Paragraph 4 (d)" *is sustained.*

CASE #6

E.C. #30 - REFUSAL TO WORK AS DIRECTED/WALK OFF - S.S. PRESIDENT McKINLEY, BERTH 93-B, 1/22/64, ASSOCIATED BANNING CO.

This complaint was discussed in the Joint L.R.C. Meeting #15-64, February 5, 1964. The details are recorded in the minutes of that meeting and the Employers made the following motion that:

“The Union business agent, P. Velasquez, be assessed the appropriate time off under Section 4 (d) of the August 25, 1960 Memorandum of Understanding for causing and participating in an illegal work stoppage.”

The Union voted “No” on the Employers’ motion and the issue was referred to the Area L.R.C. for disposition.

The Minutes of the Joint Area L.R.C. Meeting #5-64, May 6, 1964, record that E.C. #30 was discussed and the Union voted “No” on the above quoted Employer motion, and the complaint was referred to arbitration.

OPINION AND DECISION:

The record made in this hearing clearly establishes that the business agent, P. Velasquez, failed to follow the steps of the grievance machinery. The motion made by the Employers that the business agent, P. Velasquez “caused and participated in an illegal work stoppage” in violation of the August 25, 1960 Memorandum of Understanding, *is sustained*.

CASE #7

E.C. #21 - SHIP GANG #62 - REFUSAL TO WORK SHORTHANDED - S.S. CALEDONIA STAR - BERTH 228 E, 1/15/64 - MARINE TERMINALS CORP.

The Minutes of Joint L.R.C. Meeting #8-64, January 22, 1964, record in detail the discussion on this

complaint by the Committee; also, that the Employers made three motions on which the Union voted "No." The Committee agreed to refer the entire matter to the Area L.R.C.

The Minutes of Area L.R.C. Meeting #4-64, April 30, 1964, record that following a review of Employer Complaint, E.C. #21, the Employers repeated the motions made in the L.R.C. Meeting #8-64, 1/22/64, with the Union voting "No." The Employers referred the complaint to arbitration.

It was agreed in this hearing that only the motion dealing with P. Velasquez was before the Arbitrator (TR. P. 202-203). The motion reads as follows: "That the business agent, P. Velasquez, be assessed the appropriate time off under Section 4 (d) of the August 25, 1960 Memorandum of Understanding for causing and participating in an illegal work stoppage in violation of Section 11.31, Section 17.71 and Section 17.81 of the Contract."

OPINION AND DECISION:

The record made at this hearing fully supports the Employers' contention that the business agent, P. Velasquez, by his actions had violated Sections 11.13, 17.71 and 17.81 of the Contract. The above quoted motion made by the Employers as recorded in the Area L.R.C. Minutes #4-64, April 30, 1964, *is sustained.*

CASE #8

E.C. #109 - PETE VELASQUEZ, #3349
BUSINESS AGENT - CREATING A WORK
STOPPAGE - S.S. MANKATO VICTORY -
VIOLATION OF AUGUST 25, 1960 SETTLE-

MENT DOCUMENT, 3/24/64, MARINE TERMINALS CORP.

This Complaint was discussed in the Special L.R.C. Meeting #52-64, April 17, 1964. The minutes of that meeting record that disagreement was reached on the following Employers' motion:

“Employers move that Mr. Velasquez, #3349, be assessed the appropriate penalty for improperly instructing the gang, thereby disregarding the interests of the Employer and disrupting the normal harmony of the operation by creating a work stoppage in violation of Sections 11.31, 17.81, 17.83, and the August 25, 1960 Settlement Document. The Complaint was referred to Area L.R.C. for disposition.”

The Minutes of the Joint Area L.R.C. #7-64, June 23, 1964, record that on E.C. #109 disagreement was reached, with the Union voting “No” on the above quoted Employer motion. “The Employers referred the complaint to arbitration.”

OPINION AND DECISION:

The Minutes of the L.R.C. and Area L.R.C. and the record made in this hearing clearly establish that the business agent, Pete Velasquez, is guilty of creating a work stoppage in violation of the provision of the Current Agreement. The above quoted motion made by the Employers in the Area L.R.C. Meeting #7-64, June 23, 1964, *is sustained*.

CASE #9

E.C. #170 - P. VELASQUEZ, NIGHT BUSINESS AGENT - CREATING A WORK STOPPAGE IN VIOLATION OF CONTRACT - S.S.

KOHKA MARU, BERTH L.B. #28, 6/3/64 - METROPOLITAN STEVEDORING COMPANY.

The Minutes of Joint L.R.C. Special Meeting #82-64, June 4, 1964, record that disagreement was reached on a motion made by the Employers in connection with the above quoted complaint (E.C. #170). The motion reads as follows:

"The Employers move that P. Velasquez, ILWU Local #13 business agent, violated the provisions of Sections 11.2, 11.31, 15.1 and 17.15, and by participating in a refusal to work as directed, thereby caused a work stoppage in violation of the August 25, 1960 Settlement Document, Section 4 (d) and is subject to the appropriate penalty spelled out in Paragraph 4 of this Agreement.

"The Complaint was referred to Area L.R.C. for disposition."

The Minutes of Area L.R.C. Meeting #10-64, November 9, 1964, record that on the identical motion made by the Employers on E.C. #170, the Union voted "No" and the complaint was referred to arbitration.

OPINION AND DECISION:

The record made in this hearing shows that the Area L.R.C. in Meeting #10-64, November 9, 1964, agreed that in E.C. #168 and #169, the men involved in the refusal to work as directed on the S.S. KOHKA MARU, were found guilty and the complaints were "resolved with loss of wages for the remainder of the work shift as sufficient penalty in this case."

The above quoted action by the Area L.R.C. clearly establishes that the normal procedure for handling dis-

putes was not followed by the business agent, P. Velasquez, and the motion made by the Employers in the Area L.R.C. Meeting #10-64, November 9, 1964, on E.C. #170, *is sustained*.

CASE #10

E.C. 50-P. VELASQUEZ, #3349, NIGHT BUSINESS AGENT - S.S. ORNEFJELL, BERTH T.I. 262, 1/10/64 - MARINE TERMINALS CORP.

This Complaint, E.C. #50, was first discussed in the Joint L.R.C. Meeting #52-64, April 17, 1964. The minutes of that meeting read in part that:

“Union business agent refused to permit gang to complete this work in accordance with Section 3.1362 of the Contract, thereby creating a work stoppage and delay to the vessel.”

Also, “The Employers moved that Mr. Velasquez, Union business agent, be assessed the appropriate penalty for ordering this gang off the vessel, thereby creating a work stoppage in violation of Sections 11.31, 3.1362, 17.71, 17.81, and the August 25, 1960 Settlement Document.”

Disagreement was reached and the complaint was referred to the Area L.R.C. The complaint was discussed at several Area L.R.C. Meetings and following disagreement reached in Area L.R.C. Meeting #12-64, December 14, 1964, the Employers referred the complaint to arbitration.

OPINION AND DECISION:

The record made at this hearing does establish the fact that the shifting of the gang from the PHILIPPINE PRESIDENT GARCIA to the ORNEF-

JELL under the existing circumstances resulted in a gear priority violation. The proper procedure was for the Union to file a complaint with the Joint L.R.C. The fact that the gang was transferred back to the original vessel does in no way justify the action of the business agent in instructing the gang to refuse to continue working on the ORNEFJELL.

The motion made by the Employers as recorded in the minutes of the Joint L.R.C. Special Meeting #52-64, April 17, 1964, "That Mr. Velasquez, Union business agent, be assessed the appropriate penalty for ordering this gang off the vessel, thereby creating a work stoppage in violation of Sections 11.31, 3.1362, 17.71, 17.81 and the August 25, 1960 Settlement Document" *is sustained*.

CASE #11

E.C. #101 - P. VELASQUEZ, #3349 - MISCONDUCT, CAUSING AND PARTICIPATING IN A WORK STOPPAGE - S.S. MORMACWIND, BERTH 146 - 3/26/64, CRESCENT WHARF & WAREHOUSE CO.

The details of E.C. #101 are recorded in the L.R.C. Minutes of Special Meeting #28-64, 3/11/64, L.R.C. #197-64, December 11, 1964 and Area L.R.C. Meeting #12-64, December 14, 1964. The Area L.R.C. Minutes of Meeting #12-64, December 14, 1964, record that disagreement was reached, and the Employers referred the complaint to arbitration.

OPINION AND DECISION:

The signed minutes of L.R.C. Special Meeting #28-64, 3/11/64, clearly state that it was the Un-

ion's position that the teamsters were performing work in violation of Section 1.25 of the P.C.L.A.; further, that the Union business agent had stopped the teamsters from continuing the operation.

The transfer of the cargo from stevedore boards to teamster board by the teamsters was not in violation of the Current Agreement but was in accordance with the provisions of Sections 1.25 and 1.44.

The claim by the Employers that P. Velasquez is guilty of misconduct and causing and participating in a work stoppage in violation of the Agreement is sustained.

* * * *

CASE #12

E.C. #233 - WORK STOPPAGE - S.S. INDIA BEAR, BERTH #91, 7/29/64, ASSOCIATED BANNING COMPANY

The details of E.C. #233 are recorded in the Minutes of L.R.C. Special Meeting #121-64, August 12, 1964. Disagreement was reached and the Employers referred the complaint to Area L.R.C. for disposition.

The Minutes of Area L.R.C. Meeting #12-64, December 14, 1964, record that disagreement was reached and the Employers referred the complaint to arbitration.

OPINION AND DECISION:

The record made in this hearing clearly supports the Employers' position that Mr. Valesquez created and participated in a work stoppage, by instructing Ship Gang #9 to walk off the job in violation of the Contract.

The Employers' motion, recorded in the Minutes of L.R.C. Special Meeting #121-64, August 12, 1964: "That Peter Velasquez, business agent, created and participated in a work stoppage by instructing ship gang #9 to walk off the job in violation of the Contract and is thereby subject to the applicable penalties specified in the Pacific Coast Longshore Agreement and the August 25, 1960 Settlement" *is sustained*.

DATED: February 13, 1965.

/s/ Germain Bulcke

Germain Bulcke, Area Arbitrator

APPENDIX II.

Opinion and Decision of Sam Kagel, Coast Arbitrator, San Francisco, California, June 29, 1965.

In the Matter of a Controversy between Pacific Maritime Association, Complainant, and International Longshoremen's and Warehousemen's Union, Respondent.

Involving Proposed deregistration of Pete Velasquez, No. 3349.

ISSUE:

The issue in this case arises from a disagreement in the Coast Labor Relations Committee recited in Joint Exhibit 1, as follows:

"IN RE P. VELASQUEZ - REG. #31090 (LA 12-65)

The Committee now has before it the complete record made at the local and area level of the grievance machinery, including arbitration of the various complaints on which disagreement was reached. The record includes Minutes of Meeting of the Joint Longshore Labor Relations Committee, Los Angeles-Long Beach Harbor, Regular Meeting No. 194-64; Minutes of the Meeting of the Joint Area Labor Relations Committee, Los Angeles-Long Beach Harbor, Meeting No. 12-64; the Opinion and Decision of the Arbitrator (#5-65), dated February 13, 1965, with Reporter's Transcripts of Proceedings before the Arbitrator, dated January 4, 5 and 6, 1965; Referral of Dispute to Joint Coast LRC, LA 12-65, dated Febru-

ary 16, 1965; and Mr. Velasquez' Notice of Appeal to the Joint Coast LRC, dated February 23, 1965.

The Committee noted the Area Arbitrator found Mr. Velasquez guilty in ten of the twelve cases presented for decision. It was further noted that some of the decisions establishing guilt were based solely on Section 17 of the Basic Agreement, while others were based on Section 17 and the August 25, 1960 Memorandum of Understanding. The Coast Committee agrees the matter is before the Coast Committee on the ten rulings of violation of Section 17.

Based on the record before this Committee, the Employers contended that Mr. Velasquez, Reg. No. 31090, is guilty of repeated violations of Section 17 of the Pacific Coast Longshore Agreement (1961-1966), and solely under this Section 17, moved for his deregistration.

The Union members of the Committee voted 'no' and disagreement was reached."

AGREEMENT PROVISIONS:

The entire Agreement between the parties is applicable in this case. Specifically Section 17 is entitled "Joint Labor Relations Committee, Administration of Agreement and Grievance Procedures."

PMA'S POSITION:

That the International Union has a responsibility in regard to longshore locals which includes the action of local officers; that Section 18 is a "Good Faith Guarantee"; that the parties agree to observe the Agreement in good faith and "The Union commits the locals and every longshoreman it represents to observe this

commitment without resort to gimmicks or subterfuge”; that Section 11 provides that there shall be no strike or work stoppage for the life of the Agreement; that in case of grievances or disputes work shall continue; that Section 17 provides the exclusive remedy with respect to disputes; that pending investigation and adjudication of disputes work shall continue as directed and be performed as provided in Section 11; that Velasquez flagrantly ignored and violated the provisions of the Agreement, both as a working longshoreman and as a Union officer; that the Area Arbitrator found Velasquez guilty of violating the grievance procedure provisions in ten cases accruing over a period of seventeen months, nine of these cases occurring within a twelve-month period; that Section 17.81 provides that in an instance of deliberate repeated offenses a longshoreman can be deregistered.

UNION’S POSITION:

That it agrees that Section 17.81 must be read to include Union officers even though not specifically so stated; that evidence, though not supplied at the hearing before the Area Arbitrator, indicates that Case No. 5 does not in fact implicate Velasquez; that Case No. 6 does not charge a violation of Section 17 but of the August 25, 1960 Memorandum; that the Employers unilaterally violated the Agreement when they sought to keep Velasquez from working as a longshoreman even though that violation was corrected by the Area Arbitrator; that the Area Arbitrator’s decisions do not specify that Velasquez’ violations were “deliberate”; that the cases are marginal cases; that the penalty of deregistration is too excessive a penalty.

DISCUSSION:

Area Arbitrator's Award of February 12, 1965:

The following is a summary of the cases decided by the Area Arbitrator:

Case No. 1: Velasquez found not guilty of refusing to work as directed.

Case No. 2: The disposition by the Joint LRC on the complaints filed in 1959 and 1960 do not sufficiently support the Employers' contentions that Velasquez is a continuous and repeated offender.

Case No. 3: Velasquez did not violate Sections 11.21, 11.31, 17.82 and 18.1 of the current agreement.

Case No. 4: The contention of the Employers that this gang, acting in concert with Velasquez as winch driver and steward, deliberately refused to work beyond 3:00 A.M. in violation of Section 3.142 and Section 11, and deliberately created a work stoppage, is sustained.

Case No. 5: The Employers' motion that "The business agent, Pete Velasquez violated the contract and the August 25, 1960 Settlement Agreement, Paragraph 4(d)", is sustained.

(The Union now claims that Velasquez was not on duty on the date involved as business agent.)

Case No. 6: The motion made by the Employers that the business agent, P. Velasquez "caused and participated in an illegal work stoppage" in violation of the August 25, 1960 Memorandum of Understanding, is sustained.

(The Union now argues that this decision was not a violation of the Basic Agreement between the parties.)

Case No. 7: Velasquez found to have violated Sections 11.13, 17.71 and 17.81 of the contract.

Case No. 8: Velasquez would found guilty of creating a work stoppage in violation of the Agreement.

Case No. 9: Velasquez found guilty of violating provisions of Sections 11.2, 11.31, 15.1, 17.15, and participated in a refusal to work as directed thereby causing a work stoppage.

Case No. 10: Velasquez found guilty of creating a work stoppage in violation of Sections 11.31, 3.1362, 17.71 and 17.81.

Case No. 11: Velasquez found guilty of misconduct and causing and participating in a work stoppage in violation of the Agreement.

Case No. 12: Velasquez found guilty of creating and participating in a work stoppage in violation of the Agreement.

Comment on Award:

The Area Arbitrator's Awards covered incidents during a seventeen-month period. If we exclude from consideration Cases No. 5 and 6, Velasquez was still guilty of agreement violations in eight cases. Virtually all of them involved violations in failing to use properly the grievance procedure and causing illegal work stoppages. Velasquez caused these violations when a working longshoreman, a steward or Union officer.

Standard of Conduct:

The Agreement is specific and clear as to the manner in which grievances are to be processed. And is specific in prohibiting illegal work stoppages.

All longshoremen, while working as such, are required to observe all of the terms of the Agreement. Union officers, including stewards, are bound by an even higher standard of conduct than might, in some circumstances, be required of a working longshoreman. Officers and stewards have the affirmative duty to enforce the Agreements as written.

Velasquez was at times a working longshoreman, a steward and a Union officer. He was familiar with the Agreement machinery to process grievances. He knew that illegal work stoppages were prohibited. Clearly the applicable provisions of the Agreements on these matters were repeatedly called to his attention. However, he persisted in a course of conduct for which no excuse can be accepted. Nor was any in fact offered.

It is argued that deregistration is not in line with other penalties provided for in the Agreement for such offenses as pilferage, etc. However, the parties themselves agreed that deregistration was a proper penalty. Section 17.81 provides in part that "Any employee who is guilty of deliberate bad conduct . . . through illegal stoppage of work . . . shall . . . for deliberate repeated offense [be] cancelled from registration."

For purposes of assessing a penalty this provision includes Union officers. They are employees only on leave when elected to Union office. They retain their rights under the Agreement. They also are bound by

the obligations provided for in the Agreement to conduct themselves properly and not to cause illegal work stoppages.

This was clearly the intent of the parties derived from Section 17 and the tenor of the entire Agreement. The parties did not intend that a working longshoreman was to be prohibited from indulging in bad conduct and causing illegal work stoppages while at the same time a Union officer had an immunity as to such prohibited conduct. Or that the Union officer could escape the penalty that could beset a working longshoreman for such prohibited conduct. The Union concedes this.

The Area Arbitrator's Awards found Velasquez guilty in case after case of having violated Section 17 of the Agreement. Velasquez' course of conduct consisted of deliberate repeated offenses in causing illegal work stoppages. The penalty which the parties themselves wrote into the Agreement for such conduct is proper and appropriate in this case.

DECISION:

The Employer's motion to deregister Pete Velasquez, Reg. No. 31090, is granted and he shall be deregistered forthwith.

Sam Kagel,
Coast Arbitrator.



APPENDIX III.

Evidence Re: Sole Employment of Velasquez.

The *affidavit of Pete Velasquez* (TR. p. 393) shows in paragraph 3, page 2, Velasquez' long employment in the longshore industry, how his deregistration prevents him from working under the Pacific Coast Longshore Agreement or in the longshore industry, and in paragraph 4 how the defendant Pacific Maritime Association has prevented him from obtaining any longshore employment. Paragraph 5, page 3, sets forth that during the period of complaints numbered 5 through 12, that Velasquez was exclusively employed as a duly elected Night Business Agent and officer of plaintiff and solely employed as a salaried officer and not employed or engaged by any other person, persons, or entity. Paragraph 6 sets forth that while Velasquez was a Night Business Agent that he did not perform any function under the Pacific Coast Longshore Agreement or engage in any longshore activity as a working longshoremen or otherwise. Paragraphs 7 through 9 on pages 3 through 5 sets forth that his activities as a Night Business Agent were carried out pursuant to Section 4 of plaintiff's Constitution and By-Laws under the direction of his superior officers.

The *affidavit of Robert Carney* (TR. pp. 421, 422) sets forth in paragraph 22, page 8, that on the night following the incident involved in Case No. 3, December 2, 1964, that Mr. McEvoy, who was in charge of the defendant Pacific Maritime Association, in the Wilmington-Long Beach area, told him that they were out to get Pete Velasquez for the things he had done as a Business Agent and when asked "why" by Carney, McEvoy said, "Pete knows the contract too well." Velasquez as

a union business agent had won substantially all of the labor disputes arising under the Pacific Coast Longshore Agreement and substantially of the arbitrations. (TR. p. 397, Velasquez par. 9)

The *affidavit of Curt Johnson*, Local 13's President, (TR. p. 431) in paragraph 11, page 4, sets forth that Velasquez was a duly elected official of Local 13 and Night Business Agent whose duties were to enforce the provisions of the Pacific Coast Longshore Agreement on behalf of Local 13 and that during such time Velasquez performed no function or employment under the Pacific Coast Longshore Agreement. Paragraphs 25 and 26, page 9, set forth that cases numbered 5 through 12 arose while Velasquez was solely employed as plaintiff's Night Business Agent and was not performing work under or pursuant to the Pacific Coast Longshore Agreement as either an employee, longshoreman, or otherwise and that he refused to arbitrate said cases and withdrew from all arbitrations and refused to enter into any arbitration of said cases on the stated ground that to arbitrate such cases was against both Federal and State laws and that an arbitration regarding a union official did not come under Section 17.81 of the Pacific Coast Longshore Agreement. Paragraphs 30 and 31, page 11, sets forth that the defendants did not avail themselves of Section 17.281 of the agreement and allow the matter to move automatically to the next higher level but thereafter conducted an ex parte arbitration without any contention that work was not being continued as required by Section 11 of the agreement. Paragraph 43, page 16, sets forth that defendant Pacific Maritime Association deregistered Pete Velasquez and by unilateral action has prevented him from being dispatched to any job under the Pacific Coast Longshore

Agreement. Paragraph 44, page 16, sets forth that defendant PMA is enforcing the arbitrators' opinions and decisions to the detriment of Local 13 and using same to bring similar charges against other officials of Local 13.

In the answer to *Interrogatory No. 31*, (TR. p. 203, lines 20 to 25) it is further set forth that subsequent to the deregistration of Pete Velasquez that the PMA area manager stated that the decision on the part of the PMA to deregister Pete Velasquez was not a snap decision but had been considered for a long period of time prior to action having been taken.



APPENDIX IV.

Evidence Re: Coercive Effect of Arbitrary Opinions and Decisions Upon Local 13 and Membership.

The *affidavit of Patrick Leonard* (TR. p. 412), page 1, line 29, to page 2, line 2, shows that he is a duly elected Night Business Agent of plaintiff and solely employed by plaintiff and not employed as a longshoreman or under the Pacific Coast Longshore Agreement in any manner. The affidavit continues on page 2, lines 3 to 18, setting forth that since the deregistration of Pete Velasquez that on two occasions and while attempting, on behalf of LOCAL 13, to adjust contract violations carried on by the employer that the employer members of the PMA stated to him, in a threatening manner, that he could end up deregistered like Pete Velasquez and that to his personal knowledge, that other officials of LOCAL 13 have been similarly threatened and one has been so threatened a great many times, however, said officials were then attending a caucus at San Francisco and unable to make affidavits on their own behalf. On page 3, lines 18 to 22, the affiant sets forth that the threats have a serious effect on affiant and LOCAL 13 and interfered in the administration of the Pacific Coast Longshore Agreement, the administration of the LOCAL and the effectiveness of the officials in protecting the rights of the members.

The *affidavit of Curt Johnson* (TR. p. 431) in paragraph 44, commencing on page 16, sets forth that defendant PMA is enforcing the decision to the damage and detriment of LOCAL 13. The affidavit sets forth that the PMA has filed charges of violation of Section 17.81 against a union official, Chuck Brady, for carrying out his duties as a Night Business Agent and acting

solely in the scope of his employment and while solely on the payroll of plaintiff and while the said Chuck Brady was not employed as a longshoreman or under the Pacific Coast Longshore Agreement. The paragraph sets forth the coercive effect upon the officials and members and how it hampers and coerces officials in the performance of their duties and has interfered with the administration of the LOCAL and the right of the membership to be represented by and bargain through officials of their own choosing.

The *affidavit of Pete Velasquez* (TR. p. 394, 395) paragraph 4, page 2, sets forth how, due to his de-registration and being deprived from working in the industry, he will not again be eligible to run for office while he is deprived from working in the industry. The affidavit at page 394, lines 25, 29, sets forth that under the Constitution and By-Laws of the LOCAL that an official can only stay in office for a maximum of two (2) years, they must be out of office for an equal length of time before he can run for office again. Same clearly shows the coercive effect of the opinions and decisions of the arbitrators for if an official does not please the employer he may never be able to return to his former employment, consequently he will never be able to qualify to run for office again.

APPENDIX V.

Cases Under Which Velasquez Was Found Guilty.

The *affidavit of Peter Velasquez* (Exhibit 1) sets forth in paragraph 9 (TR. p. 397), how affiant as a Business Agent for LOCAL 13 engaged in and handled the working labor disputes arising from the members' performance of work and that he had won substantially all of the disputes including many arbitrations of which he won substantially all. The affidavit shows that the winning of many of the disputes was a direct result of talking to the area arbitrator, Germain Bulcke, after a problem arose and before action was taken and the arbitrator would frequently tell him in advance as to how he would rule. The affidavit shows that as to two of the alleged violation he was following the instructions of the area arbitrator.

Case Number 3 involved the "SS President Quezon" and is set forth in paragraphs 11 through 21 of the affidavit of Robert Carney (TR. pp. 419-421) sets the matter forth. The day gang had dropped and damaged the outboard boom on Hatch No. 5 and Carney requested a static test of the boom. The gang was shifted to Hatch No. 6 to work in the interim. The Federal Safety inspector came out and recommended a static test. That the area arbitrator came out at about 10:30 P.M. and first stated that he didn't believe the matter was arbitratable as he was not a safety engineer and then without even a visual inspection ruled that the boom was safe.

The affidavit shows that the boom could have been given a static test in a relatively short period of time but was refused. Carney then offered to have the gang work any other hatch or work Hatch No. 4 with a

swinging boom or in the alternative the gang would replace themselves, which would be done in a short period of time, and give up their hatch priority, these offers were refused and the gang discharged.

PMA area manager, John McEvoy, conceded that the men had a right to call replacements in a safety dispute (Exhibit 6-A, page 116), and Section 11.41 of the Pacific Coast Longshore Agreement so provides. (TR. p. 53) The static test would have taken about 45 minutes and cost about \$50.00 and it would have taken about ten (10) minutes to have sent down a new gang that was waiting at the hall. (Answer to Interrogatory No. 7.) (TR. pp. 185-186) If a static test had been given and the boom passed, the gang which was fired at 11:00 P.M. could have been working the hatch by 7:30 P.M. (TR. p. 420 Carney par. 18)

Exhibit (1), the affidavit of Pete Velasquez, par. 7, TR. pp. 395, 396, sets forth the instructions of International President, Harry Bridges, as to what to do in such a case as arose on the "SS PRESIDENT QUEZON." The instruction was not to work the gear even if the arbitrator says it is safe.

Case Number 4 involved the SS MICHIGAN and is set forth in paragraphs 4 through 10 of the affidavit of Robert Carney (TR. pp. 416, 418) sets the matter forth. Gang No. 55 was dispatched to the "SS HAI HSIN" to start employment at 6:00 P.M. and was then sold and shifted to the "SS MICHIGAN" to fulfill their eight (8) hour guarantee. The affidavit sets forth the provision of the agreement allowing the shift to fulfill the eight (8) hour guarantee and how President, Harry Bridges, had explained that a shifted gang did not have to work beyond the eight-hour guarantee. The affi-

davit shows how, after previously having been informed to the contrary that, the gang was asked to work over and called replacements and that after some of the replacements had started to work that the replacements were refused and that Mr. Velasquez was driving winches and was one of the last to know of the request to work over.

The affidavit further shows that Gang No. 80 which was also working on the ship faced a similar situation, called replacements which were refused by their employer but no action was taken against Gang No. 80.

Case No. 5 involved the "SS PRESIDENT HAYES." Velasquez had a night off and was not present nor did he have anything to do with the matter. (TR. p. 405, pars. 35, 36)

Case No. 6 involved the "SS PRESIDENT McKINLEY." The only action Velasquez took was in following out the orders of the President of LOCAL 13 after the President had talked to the PMA representative. (TR. p. 405, pars. 33, 34)

Case No. 7 involved the "SS CALEDONIA STAR" and shows Velasquez's only involvement was to obtain a man as a replacement for the gang that was working short handed and that he then sent the gang back to work and defendant's superintendent refused the replacement and fired the gang. (Velasquez, pars. 27 and 28, TR. pp. 405, 406)

Case No. 8 involved the "SS MANKATO VICTORY." The only work stoppage involved was a result of the employer refusing to accept the winch driver, Mr. Molle, and to allow him to continue to work. Mr. Molle subsequently established his right to work and was

compensated by the employer for the employer's refusal to let him work on the night in question. (Velasquez, pars. 29 and 31, TR. pp. 406, 407)

Case No. 9 involved the "SS KOHKA MARU." The case refers to dock men and swingmen who were discharged by the employer. Prior to that time, similar disputes had arisen. Affiant had won each of such disputes and on each arbitration the manning scale for dockmen had been confirmed at eight (8) men. That by phone, at the time, the area arbitrator in substance told Velasquez to file a complaint against the employer and he would have no trouble with it. However, subsequently, the Coast Committee changed the manning scale to require only those deemed necessary by the employer and the subsequent change was used against Velasquez at the ex parte arbitration. (Velasquez, pars. 32, 33, TR. p. 407)

Case No. 10 involved the "SS ORNEFJELL" Velasquez received advice on how to handle the matter from the area arbitrator and followed the instructions. The Coast Labor minutes which were used against Velasquez and referred to in page 233 of the arbitration transcript (Exhibit 6-C) did not originate until some six (6) months after the ORNEFJELL matter. (Velasquez, pars. 19-27, TR. pp. 401, 406)

Case Number 11 did not actually involve the unloading of a ship; it only involved work done by teamsters on cargo which had already been unloaded. The issue was the ILWU-Teamster pact, not the Pacific Coast Longshore Agreement. The affidavit and the arbitration transcript, pages 240-248 (Ex. 6-C) each show that work was being carried on contrary to the pact and the written orders put out by the PMA's area

Manager, J. D. McEvoy, on May 2, 1963, a copy of which is attached to the affidavit. However, at the ex parte arbitration, a prior conflicting telegram, which had been superseded, was used as evidence. (Velasquez, Pars. 28-32, TR. pp. 403, 404) All Velasquez attempted to do was obtain compliance with Mr. McEvoy's own directive, Bulletin No. 38, which is attached to the affidavit as an exhibit. (TR p. 411)

Case No. 12 involved the "SS INDIA BEAR." The situation was created by the employer refusing to accept a replacement then attempting to work the gang short handed in violation of Section 3.223 of the Pacific Coast Longshore Agreement. The gang refused to continue to work short handed and Section 3.223 provided that such a refusal was not a violation of the agreement.

APPENDIX VI.

Evidence Re: Connivance, Conspiracy, Fraud, Corruption Undue Means.

The matters had this inception about April, 1960, pursuant to the request of an outgoing Vice-President, Velasquez forwarded letters to Citrus Shippers explaining problems which were no fault of LOCAL 13. Thereafter, both the PMA President, Paul St. Sure, and ILWU President, Harry Bridges, appeared at the LOCAL 13 Executive Board Room and reprimanded Velasquez. Harry Bridges joined St. Sure in calling Velasquez down, even though the letters were not detrimental to the International (Exhibit 1, Velasquez, pars. 42 and 43, TR. p. 410)

Thereafter, and about August, 1960, the defendant, PMA, engaged in a course of conduct of harassing and coercing plaintiff LOCAL 13 into agreements against their will, the most effective being shutting the ports of Los Angeles and Long Beach down for 13 days in August, 1960, and diverting ships to other ports for unloading. (Exhibits 2, Johnston, par. 21, TR. pp. 431, 438).

Prior to the shut down of the port, all arbitration had been carried on through an independent arbitrator. That as a condition of being able to return to work, LOCAL 13 had to agree that a new arbitrator would be selected for the Southern California area. The agreement provided in part: "That *the parties* will promptly reach agreement on the selection of a new area arbitrator for the Southern California area." (emphasis added) The selection of the new area arbitrator was made by International President, Harry Bridges, and PMA Presi-

dent, Paul St. Sure, at the bar in the LaFayette Hotel, the person selected as the new area arbitrator was Germaine Bulcke. (Exhibit 2, pars. 38, 39, TR. p. 444).

During the shut down of the port, LOCAL 13 received no assistance from the International President, Harry Bridges, who, in fact, supported the employer's position and urged the signing of the agreement. (Exhibit 2, par. 47, TR. p. 448)

That since August, 1960, LOCAL 13 has had no choice in the selection of arbitrators. In November, 1964, Curt Johnston, President of LOCAL 13, attempted to obtain a different arbitrator as to have a matter heard which involved Johnston prior to his taking office. Johnston was refused on the basis that *the parties* to select the arbitrator were *Paul St. Sure* and *Harry Bridges* and no other. The refusal was conveyed to Johnston by the PMA's area manager, John McEvoy, who had taken the matter up with Harry Bridges and Paul St. Sure who were appearing together at a Symposium in Long Beach. (Exhibit 2, par. 40, TR. pp. 444, 445).

Both the area arbitrator, Germaine Bulcke, and the coast arbitrator, Sam Kagel, have been long-time friends of Harry Bridges, and both have been employed by the ILWU in positions subservient to Harry Bridges. Sam Kagel has been an acquaintance of St. Sure for a number of years, and both arbitrators obtained their jobs through Harry Bridges and Paul St. Sure. (Answer to Interrogatory No. 31, TR. p. 199).

That both Paul St. Sure and Harry Bridges were present at the area labor relations meeting at the Port of Los Angeles when LOCAL 13 was locked out in

August, 1960, but never appeared again at an area Labor Relations meeting at the port until they appeared together at the meeting of December 8, 1964. (Interrogatory No. 31, TR. pp. 199, 200).

In the interim, William Ward, Coast Committeeman and International official, stated to Velasquez that he heard that Velasquez was going to run for his job as a Coast Committeeman and showed his displeasure and was sarcastic about the matter. (Exhibit 1, Velasquez, par. 41, TR. pp. 409, 410).

William Ward, Howard Bodine and Harry Bridges are the three International officers who are the members of the Coast Committee; the remaining members are made up from the employers. During November, 1964, Johnston received a telephone call from William Ward referring to Velasquez as "Mickey Mouse". Ward asked Johnston if Mickey Mouse was still in his hair and thereafter said, "Have no worries son, we will take care of him up here." (Exhibit 2, Johnston, par. 3, TR. p. 432).

On December 2, 1954, the entirety of Gang No. 55 was put on the non-dispatch list over the "SS PRESIDENT QUEZON" matter, preventing them from being dispatched to Marine Terminals. The union filed its complaint for the firing of the gang from the "SS PRESIDENT QUEZON," the matter was heard in the Joint Port Labor Relations Committee and on December 3, 1964, the matter was referred to the Joint Area Labor Relations Committee. By past agreement and practice upon referral to the Joint Area Labor Relations Committee, all members of Gang No. 55 would come off the non-dispatch list. (Exhibit 2, Johnston, pars. 4-7, TR. p. 433).

On December 2, 1962, following the "SS QUEZON" matter, Mr. McEvoy of the PMA told Robert Carney that they were out to get Velasquez for the thing he had done as a Business Agent of the Union, the reason being that Velasquez knew the contract too well. (Exhibit 5, Carney, par. 22, TR. pp. 421, 422). During the time Velasquez was an official of plaintiff LOCAL 13, he engaged in and handled the labor disputes arising from performance of work under the contract. He won substantially all of these disputes, including substantially all of the arbitrations (Exhibit 1, Velasquez, Pars. 9 and 11, TR. pp. 397, 398).

That after the deregistration of Velasquez, Mr. McEvoy of the PMA stated that the decision to attempt to deregister an official of the ILWU was not a snap decision, but plenty of thought had been put into it and it had been considered over a long period of time prior to action having been taken. (Ans. Interrogatory No. 31, TR. p. 203)

Immediately after the matter was referred to the Area Labor Relations Committee, John McEvoy presented LOCAL 13 with a typewritten statement which he read, moving that Pete Velasquez be deregistered under Section 17.81 with 15 charges against Velasquez attached thereto, and with a typewritten statement which, in substance, blacklisted Velasquez from all employment of any of the employers under the Pacific Coast Longshore Agreement until such time all complaints against Pete Velasquez were resolved. LOCAL 13 objected that the blacklisting was a violation of the Pacific Coast Longshore Agreement and a violation of the law. (Exhibit 2, Johnston, pars. 8 to 10. TR. p. 434).

On December 3, 1964, the PMA implemented the blacklisting of Velasquez by a dispatch to the employers that they were not to accept Velasquez for employment and to fire Gang No. 55 if they objected. Never before had a member been put on a non-dispatch list to all employers. (Exhibit 2, Johnston, par. 14, TR. p. 435).

A special Area Labor Relations meeting was held December 8, 1964, at which ILWU President Harry Bridges and PMA President Paul St. Sure were present; this was their first attendance together since August, 1960. The August, 1960, appearance having been their first appearance together at Los Angeles Harbor since they chastised Velasquez in April, 1960. Paul St. Sure stated that to reinstate Velasquez that all the employer complaints against Velasquez, together with the motion to deregister him would have to be taken directly to the Coast Arbitrator and LOCAL 13 President, Curt Johnston, refused and requested that Velasquez be removed from the non dispatch list. Paul St. Sure said the proposal was inseparable and refused to remove Velasquez from the non dispatch list. Later, St. Sure proposed that the various complaints against Velasquez be handled in the Joint Labor Relations Committee and if necessary be presented to the area arbitrator and if thereafter necessary to the Coast Labor Relations Committee. St. Sure stated that if the respondent would not agree to the foregoing, that Velasquez would not be removed from the non dispatch list. (Exhibit 2, Johnston, Par. 20, TR. p. 437).

ILWU President, Harry Bridges, then stated to LOCAL 13 that St. Sure was a determined man and when he had taken a hard and fast position on an issue as he

had in the Velasquez matter, that St. Sure would possibly shut the ports of Los Angeles and Long Beach down rather than change his position. (Answer to Interrogatory 40, TR. p. 211, lines 24-29).

Due to the past coercion, harassment, and previous shutting down of the ports of Los Angeles and Long Beach, by the PMA and the fact that Harry Bridges would not assist LOCAL 13, Johnston agreed to the latter demands in the belief that the ports might again be shut down and to have Velasquez reinstated. (Exhibit 2, par. 22, TR. p. 438) (Exhibit 2, par. 55, TR. p. 450).

The matters subsequently went to arbitration and plaintiff refused to arbitrate Cases 8 through 12 which involved matters which allegedly occurred while Velasquez was a union official on the grounds that Section 17.81 did not include union officials and that the arbitration was against Federal and State laws, and the arbitrator was without jurisdiction to proceed. (Exhibit 2, Johnston, pars. 24, 25, 26, TR. pp. 438, 439) Johnston made it clear that his position was that the employer's move was illegal and coercive on the part of the PMA. (Exhibit 6-B, p. 178)

Prior to his arbitrating cases numbered 5 through 12 ex parte in attempting to induce Johnston to put up at least a token defense, the area arbitrator stated:

“* * * but it would look better even though we both know Velasquez is guilty, and heaven knows I have tried to help the guy, if you would be there to at least go through the motion.” (TR. p. 440)

The arbitrator thereafter proceeded ex parte in violation of Section 17.281 of the Pacific Coast Longshore

Agreement and the arbitrator rendered his decision. The decision was appealed to the Coast Labor Relations Committee and the Committee referred the matter to the coast arbitrator, Sam Kagel. (Exhibit 2, Johnston, pars. 30 to 33, TR. p. 441).

The matter of the blacklisting of Velasquez was finally arbitrated, and it was held that the blacklisting was in violation of Section 17.14 of the Pacific Coast Longshore Agreement and Velasquez was compensated for his loss of earnings. (Exhibit 2, Johnston, 38, TR. pp. 442, 443).

Subsequent to the award of the area arbitrator and prior to the award of the coast arbitrator, Bridges told Velasquez in an angry manner, that he was done, finished, and washed up, *if the issue of deregistration got to the coast arbitrator*, and that his only hope was he, Bridges, who was the only one who could save him, and Bridges finished the conversation by telling Velasquez, "You're through, you're all washed up." (Exhibit 2 Johnston, par. 45, TR. p. 447). (Ans. Interrogatory No. 31, TR. pp. 202, 203).

That at the time of the hearing before the coast arbitrator, Harry Bridges acquiesced in the employer position that Section 17.81 applied to union officials. (Exhibit 2, Johnston, par. 46, TR. p. 447) Bridges made the above statement even though the decision of the arbitrators was flagrantly against union principles and contrary to accepted union principles. (Answer to Interrogatory 31, TR. p. 203, lines 26-30) (Court Finding No. I, TR. p. 618)

That prior thereto, Section 17.81 had never been applied to union officials. That the Pacific Coast Longshore Agreement is ratified by the membership by secret

ballot, the matter of Section 17.81 applying to union officials had never been put to the vote of the membership. (Exhibit 2, Johnston, par. 46, TR. p. 447). In addition prior thereto in the past, many disputes had arisen over performance of the Pacific Coast Longshore Agreement and prior Business Agents had shut many jobs down and delayed many more vessels than Velasquez was charged with, and were never charged with any offense or penalized for such activities. (Exhibit 1, Velasquez, par. 10, TR. p. 397).

After the decision of the coast arbitrator, Sam Kagel, and during August, 1965, Sam Pucio had a conversation with Harry Bridges who told Pucio that they had two arbitrations going at the same time, and that they had a deal working on the belly-packing matter and the Velasquez case and that they had to sacrifice Velasquez to gain the belly-packing matter. The belly-packing award is attached to the affidavit and was issued the coast arbitrator and bears the same date as the decision deregistering Velasquez. (Exhibit 3, Pucio, TR. p. 424).

After the award of the Coast arbitrator, the area arbitrator called Johnston and stated what had happened, and he might as well accept it and suggested that Johnston try to negotiate a deal through Bridges where Velasquez would be reinstated as a Class "B" longshoreman and suggested some type of a deal where Velasquez would agree never to run for office again. (Exhibit 2, Johnston, par. 37, TR. pp. 443, 444).

After the Area Arbitrator's decision, a conversation took place with Robert Hall, an official of the PMA, who took part in contract enforcement and deregistration. Hall was confident that Velasquez would be deregistered as during the period of his employment at

San Francisco he had become familiar with the power of the joint parties regarding deregistration. Hall stated that when the parties wished to deregister someone, they meant business. He stated that on a prior occasion involving one Stanley Weir, who the parties thought was a threat to them, that to deregister Weir, that the parties had to select a list of 81 men to also be deregistered and sacrificed so as to get the one they wanted (Weir); and that he felt confident that if they would go that far, that Velasquez would certainly go. The term "joint parties" as used in the conversation was the ILWU and the PMA. The 81 men were Class "B" men who were terminated and denied employment without charges being brought against them. Weir had been a critic of Harry Bridges and the Pacific Coast Longshore Agreement. (Exhibit 2, Johnston, pars. 51 to 55, TR. pp. 449, 450)

The control of registration is important as it is a substantial means of alleviating by the joint parties any objections or opposition to any program, contract, or activity in which they wish to indulge. (Exhibit 2, Johnston, par. 49, TR. p. 449).

APPENDIX VII.

List of Exhibits.

Exhibit 1—Affidavit of Pete Velasquez

Exhibit 2—Affidavit of Curt Johnston

Exhibit 3—Affidavit of Sam Puccio

Exhibit 4—Affidavit of Patrick Leonard

Exhibit 5—Affidavit of Robert Carney

Exhibit 6-A—January 4, 1965 Transcript of Area Arbitration

Exhibit 6-B—January 5, 1965 Transcript of Area Arbitration

Exhibit 6-C—January 6, 1965 Transcript of Area Arbitration

Exhibit 7—Transcript of Coast Arbitration

Answers to interrogatories of plaintiff Local 13 received into evidence without number.

Receipt into evidence of all of the above matters is evidenced at pages 452 and 453 of the transcript.

No. 22,670

In the

United States Court of Appeals

For the Ninth Circuit

LOCAL 13, INTERNATIONAL LONGSHOREMEN'S
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ganization,

Appellant,

VS.

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LONGSHOREMEN'S AND WAREHOUSEMEN'S
UNION, a labor organization,

Appellees.

Brief of Pacific Maritime Association and International Longshoremen's and Warehousemen's Union

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vs.

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LONGSHOREMEN'S AND WAREHOUSEMEN'S
UNION, a labor organization,

Appellees.

Brief of Pacific Maritime Association and International Longshoremen's and Warehousemen's Union

STATEMENT OF THE ISSUES

1. Whether Local 13 can attack an arbitrator's award on the basis of the federal Arbitration Act (9 U.S.C. § 1, et seq.) so that Local 13 has rights or remedies in addition to those provided by § 301 of Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185).

2. Whether Local 13 must plead and prove bad faith or breach of the duty of fair representation on the part of the exclusive bargaining representative, the ILWU, in order to be able to

attack in any way the arbitrator's award or the contract provisions here involved.

3. Whether, if the issue is one for the courts, the complaints against a longshoreman for causing illegal work stoppages while acting as a union business agent were arbitrable under the grievance-arbitration procedure of the Pacific Coast Longshore Agreement.

4. Whether the district court had jurisdiction to consider the claims that the Pacific Coast Longshore Agreement or certain arbitration awards constituted unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. § 151, et seq.

5. Whether enforcement of an arbitration award revoking the contractual registration status of a longshoreman who repeatedly violated the contract is the enforcement of a money judgment against a union member within the meaning of § 301 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185).

6. Whether the arbitration award was a modification or was based on a modification of the Pacific Coast Longshore agreement in violation of that agreement or, if the issue is for the courts, in violation of § 8d of the National Labor Relations Act.

7. Whether there is any genuine issue as to any fact material to the allegations of the amended complaint.

8. Whether Local 13 has stated a claim upon which relief could be granted.

9. Whether the district court erred in finding untrue the conclusionary allegations in the amended complaint that were contrary to or unsupported by factual material adduced by Local 13.

10. Whether summary judgment affirming the arbitration award of Sam Kagel dated June 29, 1965 was proper.

STATEMENT OF THE CASE

In this appeal Local 13 seeks to set aside an arbitration award and the court judgment confirming and enforcing it. The award was the final action in the grievance-arbitration procedure of the

collective bargaining agreement between Pacific Maritime Association (hereinafter referred to as the "PMA") and the International Longshoremen's and Warehousemen's Union (hereinafter referred to as the "ILWU"). The arbitration award had the effect of discharging a longshoreman named Pete Velasquez from longshore work done by PMA member companies.

The permanent longshoremen employees of PMA members have their status as employees as a result of their "registration". These employees with the highest seniority are called fully registered (Class A) longshoremen. Velasquez became a fully registered (Class A) longshoreman in July of 1953. His registration status provided his right to work as a longshoreman and gave him the first preference in dispatch to work assignments (PCLA § 8.41)¹, in promotion to skilled jobs, in selecting the work he would do and in other work conditions. Registration status is also one of several prerequisites to receiving various fringe benefits (See e.g. PCLA § 7.1). He lost all of these contractual rights when he was deregistered. In short, he was then discharged or "fired" from his job as a PMA longshoreman.

The underlying facts here are the conduct of Pete Velasquez that led to his discharge from his job as a longshoreman and the actions in the grievance-arbitration procedure leading to that discharge, as provided in the arbitrator's award.

In October of 1964 Velasquez became a Local 13 official, having been elected as night business agent for longshoremen in Los Angeles-Long Beach harbor. The contract provides that a registered longshoreman can be granted a leave of absence for the period he is employed by the union (PCLA p. 113). During his two years in office, Velasquez caused a series of illegal work stoppages contrary to the terms of the agreement. He created

1. The Pacific Coast Longshore Agreement, 1961-1966, is attached to the amended complaint as exhibit A (C.T. 68:1-4). In this brief the agreement will sometimes be referred to as the PCLA.

these strike actions in violation of the clause stating there would be none (PCLA § 11.1). He refused to follow the contract grievance procedure and violated the contract's provisions requiring the use of its grievance-arbitration procedure (PCLA § 11.31). He thus transgressed the contractual commitment to observe the Agreement in good faith without resort to gimmick or subterfuge (PCLA § 18). PMA filed grievances against Velasquez for this course of conduct.

At the end of his term as night business agent he returned from his leave of absence to active work as a longshoreman. He exercised his contractual right to work and his right to preference in dispatch to work as a fully registered longshoreman. He continued his course of conduct of deliberate repeated offenses in causing illegal work stoppages. PMA filed grievances against Velasquez for this conduct.

All of the grievances against Velasquez were processed under § 17 of the PCLA. These came to the Joint Coast Labor Relations Committee on March 23, 1965. The minutes of the Committee "in re P. Velasquez" state, in part,

"... [T]he Employers contended that Mr. Velasquez, Reg. No. 31090, is guilty of repeated violations of Section 17 of the Pacific Coast Longshore Agreement (1961-1966), and solely under this Section 17, moved for his deregistration.

"The Union members of the Committee voted 'no' and disagreement was reached." (C.T. 103-104)

The grievance-arbitration procedure was concluded by an arbitration award of Sam Kagel, rendered on June 29, 1965. The award referred to repeated contract violations by Velasquez, specifying violations of §§ 3.1362, 3.142, 11.13, 11.2, 11.21, 11.31, 15.1, 17.15, 17.71, 17.81, 17.82, 18.1 (C.T. 58-60). The award of the arbitrator states, in part (C.T. 60-61):

"The Agreement is specific and clear as to the manner in which grievances are to be processed. And is specific in prohibiting illegal work stoppages.

"All longshoremen, while working as such, are required to observe all of the terms of the Agreement. Union officers, including stewards, are bound by an even higher standard of conduct than might, in some circumstances, be required of a working longshoreman. Officers and stewards have the affirmative duty to enforce the Agreements as written.

"Velasquez was at times a working longshoreman, a steward and a Union officer. He was familiar with the Agreement machinery to process grievances. He knew that illegal work stoppages were prohibited. Clearly the applicable provisions of the Agreements on these matters were repeatedly called to his attention. However, he persisted in a course of conduct for which no excuse can be accepted. Nor was any in fact offered."

The arbitrator discussed issues that had been presented to him in the arbitration, stating (C.T. 61-62):

"It is argued that deregistration is not in line with other penalties provided for in the Agreement for such offenses as pilferage, etc. However, the parties themselves agreed that deregistration was a proper penalty. Section 17.81 provides in part that 'Any employee who is guilty of deliberate bad conduct . . . through illegal stoppage of work . . . shall . . . for deliberate repeated offense [be] cancelled from registration.'

"For purposes of assessing a penalty this provision includes Union officers. They are employees only on leave when elected to Union office. They retain their rights under the Agreement. They also are bound by the obligations provided for in the Agreement to conduct themselves properly and not to cause illegal work stoppages.

"This was clearly the intent of the parties derived from Section 17 and the tenor of the entire Agreement. The parties did not intend that a working longshoreman was to be prohibited from indulging in bad conduct and causing illegal work stoppages while at the same time a Union officer had an immunity as to such prohibited conduct. Or that the Union officer could escape the penalty that could beset a working longshoreman for such prohibited conduct. The Union concedes this."

The arbitrator concluded his award in the following language (C.T. 62):

"... Velasquez' course of conduct consisted of deliberate repeated offenses in causing illegal work stoppages. The penalty which the parties themselves wrote into the Agreement for such conduct is proper and appropriate in this case.

"DECISION:

"The Employers' motion to deregister Pete Velasquez, Reg. No. 31090, is granted and he shall be deregistered forthwith."

Local 13 attacked the award internally in the ILWU and in court.

Thereafter Local 13 instituted action that led to the holding of a conference of the longshore division of the ILWU on August 23, 24, 25, and 26, 1965 (C.T. 302:11-16). In attendance were delegates from 24 of the 25 longshore locals on the Pacific Coast (C.T. 300:21-301:14; 302: 17-19). Local 13's delegates included its president and Velasquez. At that conference Local 13 made a motion that the ILWU reject the Kagel award deregistering Velasquez. That motion was defeated (C.T. 302:20-21).

A few days later, on September 3, 1965, Local 13 filed in Superior Court in and for the County of Los Angeles a complaint against PMA and the ILWU that alleged substantially the same facts alleged in the amended complaint that was filed in the instant case (C.T. 302:22-25). The matter was removed to district court. An amended complaint and answering pleadings were filed.

The parties carried on extensive discovery and pretrial procedures. PMA propounded interrogatories to Local 13. Those interrogatories and the answers deal with every factual allegation of the amended complaint (C.T. 181-236). PMA directed requests for admissions to Local 13 (C.T. 161-179). Responses were made (C.T. 238-258). Local 13 filed contentions of law and facts (C.T.

145-154), PMA filed its memorandum of contentions of fact and law (C.T. 265-284) and ILWU filed its contentions of fact and law (C.T. 285-289). From these the parties prepared a pretrial conference order that contained statements of jurisdiction (C.T. 298-299), stipulations of certain facts (C.T. 299-304), a statement of contentions as to remaining issues of fact (C.T. 306-324) and a statement of remaining issues of law to be litigated (C.T. 325-328). Pretrial conferences were held in open court on September 19, 1966 (C.T. 158), December 19, 1966 (C.T. 180), March 20, 1967 (C.T. 290), April 17, 1967 (C.T. 451).

The pretrial order (C.T. 297-329) was agreed to by the parties and lodged on April 4, 1967. The matter had previously been set for trial for May 9, 1967 (C.T. 158). On April 6, 1967, defendants filed their motion to modify the pretrial order to limit the issues and their motion for summary judgment with their supporting memorandum. On April 13, 1967, Local 13 filed a voluminous memorandum of points and authorities in opposition to the motion for summary judgment (C.T. 351-392) together with five affidavits (C.T. 392-450). The matter came on for hearing on April 17, 1967. At that time Local 13 supplemented the 100 pages of material it had filed on April 13 by filing the reporters' transcripts of the arbitration hearings (Ex. 6A, 6B, 6C and 7 to Local 13's Memorandum, etc. C.T. 351-392). Its counsel argued at length in opposition to the motion for summary judgment (C.T. 451).² When Local 13's counsel had completed his presentation, the district court took the motion for summary judgment under submission and ordered the motion to modify the pretrial order off the calendar (C.T. 451).

The court ruled on April 25, 1967, that the summary judgment should be entered (C.T. 452-455). The court, in its subsequent opinion, summarized the steps taken before it reached this conclusion, stating:

2. The reporter's transcript of this argument was designated but not reproduced (C.T. 697:1-3).

"Both PMA and ILWU have moved for summary judgment after considerable pretrial discovery, a comprehensive pretrial conference order and voluminous contentions of law and fact have demonstrated that there is no genuine issue as to any material fact. The Court has reached the decision that the motion for summary judgment should be granted but it should be noted that this decision was reached only after the plaintiff exhausted numerous and extensive opportunities to show there were litigable issues of fact on this element of its claim." (C.T. 610:20-29)

Local 13 does not now claim that it was not afforded an opportunity to present all relevant factual material.

The court asked for a proposed decision, findings of fact, conclusions of law and a summary judgment (C.T. 454:28-32). The PMA and ILWU presented these.³ Local 13 filed a 91 page response (C.T. 458-549). "The lower Court did not adopt or sign the findings of fact, conclusions of law or judgment submitted by defendant P.M.A. and prepared and filed on December 20, 1967, its own findings of fact, conclusions of law and judgment." (Op.Br. 26).

The district court filed detailed findings and conclusions.

The first seventeen findings of fact of the District Court are not attacked by Local 13. These findings succinctly state the facts. They are set out below *in haec verba* (C.T. 572-577).

"- 1 -

PMA is a duly organized and existing California non-profit corporation having its principal place of business in Wilmington, California. PMA represents its member steamship, stevedoring and terminal companies for the purpose of negotiating and administering the collective bargaining contracts with the unions representing the stevedoring employees of its member companies.

3. This document was designated but not reproduced (C.T. 695:28-29).

The companies represented by PMA are engaged in commerce, as defined by the Labor-Management Relations Act of 1947, as amended, 29 United States Code, Section 142.

"- 2 -

The ILWU is a duly organized and existing labor organization within the meaning of the Labor-Management Relations Act of 1947, as amended, 29 United States Code, Section 152. The ILWU was certified by the National Labor Relations Board on June 21, 1938, as the exclusive bargaining representative for longshoremen on the Pacific Coast. [See 7 N.L.R.B. 1002 (1938).] Moreover, it is the exclusive representative for collective bargaining purposes for employees performing longshore work for members of PMA along the Pacific Coast.

"- 3 -

Local 13 is one of the ILWU's longshore locals. Local 13 is also located in Wilmington, California, and its members are engaged in longshoring in the Los Angeles and Long Beach harbor areas.

"- 4 -

PMA and the ILWU have entered into a collective bargaining contract, entitled 'Pacific Coast Longshore Agreement, 1961-1966', governing the wages, hours, working conditions and disciplining of longshoremen employed by PMA members on the Pacific Coast. This agreement also binds Local 13 and its members.

"- 5 -

The contract contains a grievance procedure for the resolution of disputes. In the event that a dispute is not settled on the job or does not arise on the job, it then moves to a formal grievance procedure containing the following five steps: (1) a Joint Port Labor Relations Committee having jurisdiction over grievances and disputes arising in a single port; (2) a Joint Area Labor Relations Committee having jurisdiction over a wider geographi-

cal area; (3) arbitration before an Area Arbitrator who has jurisdiction over the same area as the Joint Area Committee and enjoys the additional power to pass upon its own jurisdiction; (4) a Joint Coast Labor Relations Committee having jurisdiction over the entire geographical area covered by the collective bargaining contract; and (5) arbitration before a Coast Arbitrator who, like the Area Arbitrator, has the power to pass upon his own jurisdiction.

“- 6 -

The contract establishes a group of employees, referred to as Class A longshoremen, who have a priority over other employees in obtaining available longshore work and in securing other benefits.

“- 7 -

Pete Velasquez was a Class A longshoreman from July, 1953 until July 29, 1965 in the Los Angeles-Long Beach Harbor. However, from October 1, 1962 until October 1, 1964, Velasquez served most of his time as a night business agent for Local 13. Velasquez worked primarily as a longshoreman again from October, 1964 until July, 1965.

“- 8 -

During the time Velasquez was a night business agent as well as during the latter part of 1964, various member companies of PMA had filed a dozen charges against Velasquez. On the basis of these twelve complaints, PMA moved to deregister Velasquez by taking the first step in the grievance procedure before the Joint Port Labor Relations Committee (Los Angeles-Long Beach) meeting in December, 1964 after Velasquez had been involved in a dispute on board the S.S. President Quezon.

“- 9 -

At the Joint Port Labor Relations Committee meeting, the parties were unable to resolve the issues involving Velasquez, and PMA accordingly referred the matter to the Joint Area Labor Relations Committee.

"- 10 -

The Velasquez grievances were considered but not resolved in the December 14, 1964 meeting of the Joint Area Labor Relations Committee, and the matter was referred to the Area Arbitrator by PMA.

"- 11 -

In accordance with the custom in the Los Angeles and Long Beach Harbor area, the employee and the local union were represented in the committee meetings and in the area arbitration by officials of Local 13.

"- 12 -

On January 4, 5, and 6, 1965, an arbitration hearing was held before Germain Bulcke, the Area Arbitrator for the Southern California area. Officials of Local 13 participated in that portion of the hearing during which evidence was presented relating to the alleged contract violations committed by Velasquez while he was working as a longshoreman after he had completed his term as night business agent. This portion of the hearing, involving the S.S. President Quezon and the S.S. Michigan, was concluded on January 5, 1965. The balance of the hearing, concerning the complaints against Velasquez for contract violations while he was a night business agent, was conducted and completed on January 6, 1965, but officials of Local 13 refused to participate in it.

"- 13 -

The Area Arbitrator ruled that the proceeding could continue ex parte under the terms of the contract, and this ruling was not challenged anywhere in the subsequent two formal steps of the grievance procedure.

"- 14 -

On February 13, 1965, Area Arbitrator Bulcke rendered a decision finding Velasquez guilty of ten of the twelve complaints filed against him, including the complaints concerning the S.S. President Quezon and the S.S. Michigan.

Officials of Local 13 then referred the Velasquez grievance to the Joint Coast Labor Relations Committee, where the employee and union were represented by officials of the ILWU which is customary at this level of the grievance procedure. When the Committee considered the grievance on March 23, 1965, PMA and the ILWU were unable to agree on a resolution of the matter, and it was referred to the final step in the arbitration process, a hearing before Sam Kagel, the Coast Arbitrator.

On April 28, 1965, a hearing was held before the Coast Arbitrator at which the employee and union were represented by officials of the ILWU. The ILWU spokesman took the position that, while a union official could be deregistered for repeated contract violations, deregistration was not warranted under the circumstances of this case. The Arbitrator rendered an award deregistering Velasquez on June 29, 1965 and ordered his name removed from the list of Class A longshoremen.

For several years prior to the Velasquez matter, Germain Bulcke, as Area Arbitrator for the Southern California area, and Sam Kagel, as Coast Arbitrator, were the designated arbitrators who regularly heard grievances arising under this contract."

Finding 18, in contrast to the 17 findings just quoted as to which no claim of error is made (Op. Br. 27-33), gives rise to one of the principal grounds relied upon by Local 13 in attacking the judgment below. This finding reads (C.T. 616-618):

"Local 13 has asserted that the ILWU acted arbitrarily, discriminatorily and in bad faith in processing the Velasquez grievance. More specifically, it contends that this conclusion is warranted on the basis of the following factual claims which the Court, taking all facts in the light most favorable to plaintiff and for the purpose of ruling upon the motion

for summary judgment, assumes to be and finds to be true:

* * *

"K. That the award manifestly disregards the collective bargaining agreement and the law."

Local 13 also attacks Finding 19, which reads (C.T. 618-619):

"The allegations contained in Local 13's amended complaint, to the extent that they are inconsistent with the Findings of Fact herein, are untrue."

The court reached detailed conclusions.

The summary judgment was based upon conclusions (C.T. 619-639), which the court stated it was making either as conclusions of law or findings of fact (C.T. 619:4-7). These are summarized as follows:

1. The court has jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (C.T. 619:11-14).

2. The award of the Coast Arbitrator and the actions taken through the grievance machinery "were and are in complete accordance with . . . [the applicable contract], particularly the terms governing the grievance-arbitration procedure".

"Each award and decision 'reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is'. *Humphrey v. Moore*, 375 U.S. 335, 351 (1964) relying upon *Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963)." (C.T. 619)

3. On the record before the lower court, Local 13 was obliged to establish that there was a breach of the duty of fair representation in order to establish a basis for relief in the federal courts with respect to the arbitrator's award.

"Nowhere in the record can we find any support for plaintiff's attack upon the integrity of the ILWU and of the procedures which led to the Coast Arbitrator's award and the Area Arbitrator's award. . . . Nowhere is there a factual statement, claim or allegation of fraud, deceitful action or dishonest conduct." (C.T. 623)

4. There is no breach of the duty of fair representation even when all of the factual contentions are accepted as true. This conclusion sets forth, in support, a detailed analysis of each of the factual contentions made by Local 13. (C.T. 624-638).

5. Local 13 is not entitled to any relief. The conclusion states:

"There is no genuine issue as to any fact material to the amended complaint herein. The amended complaint and each and every cause of action therein alleged fails to state a claim upon which relief can be granted. Plaintiff is not entitled to any relief under or by virtue of the amended complaint and, in particular, is not entitled to any order or judgment setting aside or vacating the Coast Arbitrator's award dated June 29, 1965, or the Area Arbitrator's award"

6. PMA is entitled to a summary judgment confirming and enforcing the award.

SUMMARY OF FACTS

This case involves a Los Angeles longshoreman (Pete Velasquez), his exclusive representative for collective bargaining purposes (ILWU, which has been duly certified as such by the National Labor Relations Board), one of its longshore locals to which ILWU delegated certain of its duties in the administration of its collective bargaining agreement covering the longshoremen (here, Local 13), and the association of the employers of the longshoremen (PMA) with whom ILWU carries on collective bargaining and with whom it had a collective bargaining contract in effect during the period here relevant. The relevant provisions of that contract are in a document entitled Pacific Coast Longshore Agreement (PCLA). Under that contract an arbitration award was entered discharging Velasquez.

The conduct of Pete Velasquez that led to his discharge constitutes the subject matter of this appeal. During the period of his employment as a longshoreman by PMA, he was elected to and acted as an official of Local 13 in carrying on certain of the functions of ILWU that had been delegated to Local 13 and in turn

to him. In doing so he caused violations of the contract provisions that there shall be no work stoppages and that the grievance-arbitration procedure shall be "the exclusive remedy with respect to any disputes" and violations of the specific language stating, "Pending investigation and adjudication of such dispute work shall continue to be performed. . . ." This course of conduct was carried on in the face of contractual language providing, "As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks or subterfuge." In addition, after he had left his position as a Local 13 official, he caused and engaged in other illegal work stoppages in violation of the contract.

PMA filed grievances with respect to this conduct, asserting that he had violated the contract provisions and demanding his discharge therefor. PMA relied upon the contract provision that discharge was the proper discipline "for deliberate repeated offense" of the types here involved. These grievances were carried through the grievance-arbitration procedures. They ended with an arbitration award by Sam Kagel, permanent Coast Arbitrator. The arbitrator concluded, "Velasquez' course of conduct consisted of deliberate repeated offenses in causing illegal work stoppages. The penalty which the parties themselves wrote into the Agreement for such conduct was proper and appropriate in this case." Thereupon, he ordered that Pete Velasquez be discharged.

SUMMARY OF ARGUMENT

Local 13 has proceeded, on its own behalf and on behalf of Pete Velasquez, to attack the arbitration award. ILWU, as exclusive representative for collective bargaining purposes, has accepted the award as valid and has acted to enforce it. Accordingly there is no direct attack upon the award, but merely a

collateral attack being brought by and on behalf of those who are represented in these respects by the ILWU as their exclusive representative for collective bargaining purposes in accordance with the provisions of the National Labor Relations Act.

There is no merit in Local 13's argument that the negotiation and execution of § 17.81 of the PCLA were violations of the National Labor Relations Act. The claim is on the ground that § 17.81 provides, as the ILWU and the PMA and the arbitrator have said it provides, that a union official can be discharged for deliberately and repeatedly causing illegal work stoppages. Such a claim is within the exclusive jurisdiction of the National Labor Relations Board. The Board has held similar claims to be without merit. The act of negotiating a contract so providing cannot be successfully attacked in court. First, such a contract term is clearly within the "wide range of reasonableness" allowed the exclusive collective bargaining representative in negotiating a contract. Second, there are no factual allegations, which if proved, would establish a breach of the duty of "complete good faith and honesty of purpose" in negotiating the contract.

Local 13 erroneously asserts that the enforcement of § 17.81 through the arbitration award can be set aside. This claim is made on the ground that the deregistration called for by the award constitutes an unfair labor practice under the National Labor Relations Act. This contention, whether it be on the basis of the language in the arbitration act or on a bare claim of judicial power or on the basis of a claim that the National Labor Relations Act is a part of every contract, is without merit. The National Labor Relations Act gives exclusive jurisdiction to the Labor Board with respect to any claims that arguably assert that an unfair labor practice has been committed. Local 13 has shown no basis for an exception to the well recognized rule that precludes judicial enforcement of that statute, except only in the enforcement of Labor Board orders and in the issuance of injunctions on petition of the National Labor Relations Board.

Local 13 asserts that it may prosecute an attack on the award under 9 U.S.C. §§ 1-14, especially § 10(a), (b) and (d). Local 13 has no standing to do so because it is not a party to the collective bargaining contract under which the award was entered and because it and all of its members are bound by the actions of their duly certified exclusive representative for collective bargaining purposes. ILWU alone has power and authority under the law to act in this area. It alone can directly attack the award. In any event, there is no cause of action under 9 U.S.C. §§ 1-14 with regard to the award. A claim for relief in an attack on, or in a proceeding to confirm, an arbitration award under a collective bargaining contract derives solely from § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The substantive law involved is not that set forth in 9 U.S.C.; it is "the federal common law in this area of labor relations" that the courts formulate under § 301.

Local 13 can, and Velasquez individually could have, sought relief from the award through a collateral attack on it under § 301. Such an attack, however, can be made only if the moving party can show that there has been a breach of the duty of fair representation by the exclusive collective bargaining representative and can also show that there has been a violation of the collective bargaining contract involved. The district court entered a summary judgment holding that Local 13 had failed to assert factual claims that, if proven, would have established any breach of the duty of fair representation.

Under § 301, the courts may also confirm an award. PMA filed appropriate pleadings calling for a confirmation of the award of Sam Kagel. ILWU agreed that the award was lawful and proper in all respects and should be confirmed, but Local 13 has asked that confirmation and enforcement be denied. The district court entered a judgment confirming the award.

The summary judgment of the court below was correct in all respects. There was no need to litigate the factual issues. The

court below accepted as having been proved the evidence that Local 13 claims establishes the factual contentions on which it relies. Accepting these contentions as the facts, the court held that they would not establish a breach of the duty of fair representation and, accordingly, that there was no basis for setting aside the award. In turn it concluded that the award was to be confirmed and enforced, it being final and binding as stated in the contract.

ARGUMENT

I. The Arbitration Act does not give Local 13 additional rights beyond those it has under § 301 of the Labor Management Relations Act 1947, as amended (29 U.S.C. § 185).

Local 13 in its Point A argues that the district court erred in not holding that Local 13 was entitled as a matter of law to independent relief under the provisions of the Arbitration Act, 9 U.S.C. § 10. The basis for federal jurisdiction in this proceeding is § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Although Local 13 has not attacked Conclusion I of the court below (C.T. 580) and has not urged any additional basis for federal jurisdiction, it does assert that the substantive law applicable in a § 301 proceeding includes the law set forth in the federal Arbitration Act, 9 U.S.C. §§ 1, et seq.

a. This is a § 301 suit and the substantive law to be applied does not include the Arbitration Act.

The Supreme Court has ruled: “[T]he substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws.” *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 at 456 (1957). The United States Arbitration Act is not part of that substantive law. In *General Electric Co. v. Local 205*, 353 U.S. 547 (1957) the Court stated:

“The union brought suit in the District Court to compel arbitration of the grievance disputes. The District Court

dismissed the bill, being of the view that the relief sought was barred by the Norris-LaGuardia Act. 129 F Supp 665. The Court of Appeals reversed, 233 F2d 85. It first held that the Norris-LaGuardia Act did not bar enforcement of the arbitration agreement. It then held that while § 301(a) of the Labor Management Relations Act of 1947 gave the District Court jurisdiction of the cause, it supplied no body of substantive law to enforce an arbitration agreement governing grievances. But it found such a basis in the United States Arbitration Act, which it held applicable to these collective bargaining agreements. . . .”

Local 13 quotes this language and then stops (Op. Br. 37). The Supreme Court, however, continues:

“We affirm that judgment and remand the cause to the District Court. We follow in part a different path than the Court of Appeals, though we reach the same result. As indicated in our opinion in No. 211, *Textile Workers Union of America v. Lincoln Mills of Alabama* (US) supra, we think that § 301(a) furnishes a body of federal substantive law . . . [that is applicable].” (353 U.S. at 548).

The Supreme Court explicitly refused to base its action on the provisions of the Arbitration Act, 9 U.S.C. §§ 1-14. It held that the Arbitration Act was not the substantive law to be applied in § 301 suits for the enforcement or setting aside of an arbitration award. In such suits, it holds, the substantive law applicable is the same as is applicable in other cases under § 301. This is the federal common law in this area of labor relations. See *Dowd Box Co. v. Courtney*, 368 U.S. 502, at 507 and 514 (1962). It is this common law that the courts are to “fashion from the policy of our national labor laws”. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 at 456 (1957).

The federal Arbitration Act, 9 U.S.C. 1 et seq., was originally enacted in 1925. It was intended to apply to commercial disputes and not to “contracts of employment”, § 1. Nevertheless, Local 13

relies on numerous cases applying the Arbitration Act to commercial disputes. One such case is *Wilko v. Swan*, 346 U.S. 427 (1953). These cases are not applicable to § 301 suits such as the instant case. In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court said at p. 578:

"Thus the run of arbitration cases, illustrated by *Wilko v. Swan*, 346 U.S. 427, [98 L.ed. 168, 74 S.Ct. 182,] becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." (363 U.S. 574 at 578.)

Other cases cited by Local 13 are not contrary to the foregoing. In *Metal Product Workers Union, Local 1645 v. The Torrington Company*, 358 F.2d 103 (2nd Cir. 1966) the court affirmed summary judgment in favor of the company enforcing an arbitration award. On appeal the union urged that the arbitration award must be vacated under § 10 of the United States Arbitration Act. The court did not hold that Act applied in § 301 suits. It stated "Even if § 10 were applicable, review of the grounds enumerated in the statute would not alter the result which we have reached." (358 F.2d 103 at 106)

The Arbitration Act does not state "the policy of our national labor laws" and so is not a direct source of this federal common law. It may, however, "provide a 'guiding analogy' ". See *Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133 (2nd Cir.,

1957). Local 13 must base its case upon the substantive law fashioned by the courts for § 301(a) suits. Provisions in the federal Arbitration Act may be viewed as a "guiding analogy" but in no event does that Act provide any rights beyond those provided under § 301. It can never call for a court decision that is at variance with the policy of our national labor laws.

b. The federal common law applicable in § 301 suits is in direct conflict with Local 13's claims as to the meaning of the Arbitration Act.

The major thrust of the federal labor policy is to permit employes the right to bargain collectively through representatives of their own choosing (29 U.S.C. § 157). To facilitate the exercise of that right the National Labor Relations Board is empowered to decide upon appropriate units of employes for the purpose of collective bargaining (29 U.S.C. § 159). A majority of employes within an appropriate unit may select by election, or otherwise, a representative for collective bargaining (29 U.S.C. § 159 subd. c). Congress has declared that for the purposes of collective bargaining the representative so selected shall be the exclusive representative of all employes in the unit (29 U.S.C. § 159 subd. a). In the instant case the ILWU is the exclusive bargaining representative. The Labor Board has expressly so certified the ILWU, 7 NLRB 1002 (1938).

The district court properly refused to fashion federal common law to sustain the contentions of Local 13 based on the Arbitration Act. By these contentions, Local 13 claims that it has the same rights to proceed to set aside the arbitration award as the exclusive bargaining representative. The policy of federal labor law establishes it does not. Local 13 and its members gave up individual rights in gaining the ILWU as their exclusive bargaining representative for collective bargaining purposes. See *J. I. Case v. Labor Board*, 321 U.S. 332, 338-339 (1944). The applicable

substantive law requires that ILWU be treated as this exclusive representative of Velasquez and of Local 13. This is true as to arbitration awards. "For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The claim that the Arbitration Act should be applied in violation of federal labor law policy is not to be sustained.

Local 13 indirectly argues that it is the exclusive bargaining representative. Local 13 in its brief states that it was before the trial court "as an adverse party to the arbitration conducted at the request of defendant P.M.A. and the only other party to such proceedings" (Op. br. 39-40, see also Op. br. 33, 38, 44). This statement is contrary to the uncontested facts found by the district court. The grievance moved through five steps of the grievance arbitration procedure contained in the agreement between the ILWU and PMA. In accordance with custom and practice in the Los Angeles-Long Beach Harbor area officials of Local 13 represented the union and the employee at the lower levels of the procedure. At the upper two levels including the final arbitration level the union was represented by officials of the ILWU (C.T. 615:19-21). There is no factual support for the conclusionary statement that Local 13 was the only other party to such proceedings. The contrary findings and the Labor Board's certification are binding; Local 13 acted only as a sub-agent of ILWU, the exclusive representative for bargaining purposes. Only the ILWU could have attacked the award directly.

Local 13 also urges this Court to hold that the Arbitration Act gives the district court jurisdiction to consider whether the de-registration of Velasquez was an unfair labor practice under § 8a of the Labor National Relations Act (29 U.S.C. § 158 subd. a). The argument is based on the provision of the Arbitration Act that empowers courts to vacate awards where the arbitrator ex-

ceeded his power (9 U.S.C. § 10 subd. d). This argument is without merit. Congress has given exclusive jurisdiction over claims of unfair labor practices to the Labor Board. (See part V, below.)

II. To prevail Local 13 must plead and prove bad faith on the part of the ILWU.

Local 13 in its Points B, G and K argues that the district court erred in holding that the awards are final and binding and that Local 13, in order to prevail, must plead and prove bad faith, dishonesty of purpose, or a hostile or invidious motivation on the part of the exclusive bargaining representative.

a. Local 13 in attacking the result of the grievance-arbitration procedure can be successful only if it shows hostile discrimination or invidious conduct on the part of the ILWU.

We have shown that Local 13 can not bring a direct attack on the award. A collateral attack on the result of the collective bargaining grievance-arbitration procedure can be successful only where it is shown that the exclusive bargaining representative exceeded its statutory power.

The ILWU as exclusive bargaining representative has negotiated a collective bargaining agreement covering all longshoremen on the Pacific Coast. The provisions of § 17 of that Contract are conceded by all to be part of the collective bargaining contract that applies to this controversy. Section 17.27 provides: "[T]he decision of the Coast Arbitrator shall be final and binding". Section 17.53 provides in part, "[T]he arbitrators shall have power to pass upon any and all objections to their jurisdiction."

1. The result reached in the grievance procedure is final and binding.

The instant case is an attempt by Local 13 to set aside the end result of the grievance procedure. It is well settled that where the parties to a collective bargaining contract have agreed to submit their disputes to final and binding arbitration, courts will not re-

view the merits of any controversy so decided. Particularly, the court will not rehear or reweigh the evidence offered at the arbitration hearing. Nor will the court substitute its interpretation of the collective bargaining contract for that of the arbitrator. These principles have been stated by the United States Supreme Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Local 13 has attempted to distinguish the three Steelworkers cases on the basis of factual differences between those cases and the instant cases. Such factual differences are unimportant. The significant holding of these cases states the role of grievance-arbitration procedures in collective bargaining contracts in furthering the federal labor policy of maintaining labor peace. Awards under such contracts, therefore, are normally enforced by the courts as a matter of routine, even where court action is instituted by the exclusive representative for collective bargaining.

2. Local 13 is required to show a breach of the duty of fair representation on the part of the ILWU.

The principal issue before the district court was the same as the one the Supreme Court confronted in *Humphrey v. Moore*, 375 U.S. 335 (1964). The Supreme Court held that a final decision in the grievance-arbitration procedure will not be set aside by a court in the absence of a showing that the decision was obtained by improper conduct of the union in breach of its duty of fair representation. Such a showing must be further supported by establishing a violation of the collective bargaining contract before any effective relief can be provided.

Humphrey v. Moore, supra, involved two companies ("E & L" and "Dealers") that had operated in the same geographic area.

They agreed to split the area between them and each agreed to retire from the other's now exclusive area and to this end, to transfer facilities back and forth. A dispute arose among the employees of the two employers as to who should be laid-off and who should continue to work.

The employees of both companies were represented by the same union and had similar or identical collective bargaining contracts. The contracts contained identical provisions regarding the employees' seniority rights. E & L was the older company, and its employees generally had greater seniority than those at Dealers; any dovetailing of the seniority lists would mean a displacement of many of Dealers' employees. Both contracts also included an identical clause, § 5, regarding the resolution of disputes arising out of mergers or absorptions. The grievance procedure was also the same in both collective bargaining contracts. It provided for referral first to a local joint union-employers committee and, next, to a Joint Conference Committee in Detroit. The decision of the Joint Conference Committee was to be binding unless it could not agree on a decision. In that event, the dispute was to be submitted to arbitration.

The seniority dispute was referred to the local committee. It did not settle it. It was then referred to the Joint Conference Committee, where it was decided that the seniority lists be dovetailed. Many of Dealers' employees (including plaintiff Moore) lost their jobs under this decision.

Moore, acting for himself and all others in his situation, filed a complaint in the Kentucky state court seeking an order retaining Dealers' employees in their jobs. *There were allegations of a hostile, false, deceitful, conniving, dishonest breach of the duty of fair representation in the conduct of the grievance procedure before the Joint Conference Committee.* Moore alleged that the local union president had told Dealers' employees that they had nothing to worry about and had thus lulled them into a false sense

of security. He contended that, as a result, they were denied the opportunity of making their contentions fully known to the Joint Conference Committee in its consideration of the grievance. He also alleged that the union president had purposely deadlocked the local committee in order to effect this discrimination against the Dealers' employes. There were further detailed allegations of "false and deceitful" action, of "connivance", and of "dishonest union conduct in breach of its duty of fair representation" in the Joint Conference Committee proceedings. There were allegations that the employes were deprived of a Joint Conference Committee hearing by the acts of the local union president (1) in espousing the cause of rival group within the union after having deceitfully connived against plaintiffs and (2) in deceiving the Dealers employes by indicating that the union would support their cause in the grievance procedure. There were allegations of a violation of § 5 of the contract. The pleadings asserted that the decision of the Joint Conference Committee, which changed plaintiffs' seniority standing so that they would be discharged, was the result of an incorrect interpretation and application of the collective bargaining contract in that § 5 precluded dovetailing of seniority in these circumstances.

The Kentucky trial court denied the injunction sought by Moore, but the Kentucky Court of Appeals reversed and granted it. It held, in effect, that the Joint Conference Committee violated § 5 of the contract when it decided the grievance by ordering dovetailing of seniority on the ground that the change in the operation of the companies was not a merger or absorption that would give the Joint Conference Committee jurisdiction under § 5. On this basis, it held the administrative decision modifying the Dealers seniority list to be in violation of the contract. Certiorari was granted.

The Supreme Court majority opinion holds that judicial relief could be granted *if* the Joint Conference Committee had erred in

changing seniority status so as to affect jobs, and *if* the change was arbitrary or capricious, and *if* the Joint Conference Committee procedure had been poisoned by the union's breach of its duty of representation in handling the seniority issue in the grievance proceeding at the Joint Conference Committee level. The Court held that Moore had sufficiently pleaded that his contract rights had been violated and had pleaded that this contract violation had occurred as a result of union activity in the administration of the grievance procedure that was *in breach of his right to and its duty of fair representation*. Therefore, the Court concluded, Moore had standing to sue, the court was not bound by the Joint Conference Committee decision if Moore established the breach of the duty of fair representation pleaded, and the court could itself then determine whether the jurisdictional fact under § 5 of a merger or absorption had been established.

Pete Velasquez and his agent Local 13 are required to show breach of the duty of fair representation by the ILWU in the operation of the grievance procedure just as Moore and his co-plaintiffs were required to show breach of the duty of fair representation on the part of their exclusive bargaining representative.

3. Local 13 has failed to adduce evidence to show breach of the duty of fair representation by the ILWU in the operation of the grievance procedure.

Much factual material is adduced by Local 13 in regard to its claim that the ILWU breached its duty of fair representation in the operation of the grievance procedure. This is the same material it claims shows that there was a violation of the ILWU's duty of "complete good faith and honesty of purpose". That material, even if true, would not establish a violation of the "duty of fair representation". A detailed discussion of those allegations is in part III of this brief.

- b. Local 13 in attacking the PCLA can be successful only if it shows the ILWU acted outside its authority as collective bargaining representative.

Local 13 is attacking the collective bargaining contract.

Local 13 claims that § 17.81 of the Pacific Coast Longshore Agreement does not permit the revocation of the contract registration status of a longshoreman who repeatedly violates the contract while serving as a union business agent. It provides in part:

“Any employee who is guilty of deliberate bad conduct in connection with his work as a longshoreman or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offense, cancelled from registration.”

Local 13’s argument requires the premise that Velasquez was not an “employee” or a “longshoreman” within the meaning of this clause.

One issue discussed at the hearing before the Coast Arbitrator was whether § 17.81 should be interpreted to insulate the contractual registration status of persons while acting as union business agents so that they are free to engage in deliberate repeated violations of the contract under which they gained and hold their registration status. At that hearing the interests of the union and of the employee were represented by officials of the ILWU, the exclusive bargaining representative (C.T. 615:19-21). The ILWU agreed (see 31 and 46) that the registration status of business agents is not insulated and that § 17.81 does provide for the cancellation of the contractual registration status of a longshoreman who repeatedly violates the contract even while acting as a union business agent (C.T. 615:21-24). The Coast Arbitrator applied the contract provision in accordance with the expressed intent of the parties to that contract. Furthermore, if Local 13 could show *Humphrey* discrimination, it would be bound by the award. As the Supreme Court stated in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960):

"It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

If Local 13 is to succeed, it must attack the contract itself rather than the award.

Local 13 must show that the ILWU in agreeing to § 17.81 acted outside of its authority as exclusive bargaining representative.

The ILWU as exclusive bargaining representative has power to negotiate agreements for longshoremen in the bargaining unit. One who attacks that agreement must show that it was beyond the power of the ILWU to negotiate. The Supreme Court has defined the scope of the power of the exclusive bargaining representatives such as the ILWU to negotiate collective bargaining contracts. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Court stated: "The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility." (345 U.S. at 339.) "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." (345 U.S. 337-338.) The power of the exclusive bargaining representative is not unlimited. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." (345 U.S. at 338.)

Local 13 argues that it can attack the contract negotiated by the ILWU without being restricted by the limitations imposed by *Ford Motor Co.*, *supra*. Local 13 asserts that those types of limitations apply only to individuals such as Huffman, plaintiff

there. That case was not decided on the basis of Huffman's status. The determinative factor was the status of the International as exclusive bargaining representative. In the present case the ILWU is the exclusive bargaining representative. Local 13 cannot show that ILWU exercised these powers improperly.

Section 17.81 is within the range of reasonableness.

Section 17.81 provides for deregistration for repeated illegal work stoppages, doing so as an integral element of a fundamental part of the contract. Thus § 11.1 provides:

"11.1 There shall be no strike, lockout or work stoppage for the life of this Agreement.

"11.2 The Union or the Employer, as the case may be, shall be required to secure observance of this Agreement.

"11.3 How work shall be carried on.

"11.31 In the event grievances or disputes arise on the job, all men and gangs shall continue to work as directed by the employer in accordance with the specific provisions of the Agreement or if the matter is not covered by the Agreement, work shall be continued as directed by the employer."

Further, § 17 provides an extensive grievance procedure for resolving all grievances and disputes. Included are special provisions for rapid interim resolution of disputes that arise on the job.

The Supreme Court has recognized the essential character of the grievance-arbitration procedure, stating: "The grievance procedure is . . . a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 at 581 (1960). Engaging in a work stoppage rather than resorting to the grievance procedure is destructive of the collective bargaining process.

This fundamental principle was recognized by Harry Bridges, president of the ILWU. At the coast arbitration hearing he commented:

"Mr. Bridges: Well, I would like to say this much on what Ben just stated:

"One of the reasons, if not the main reason, that the motion to deregister is before the Arbitrator is because of the offenses as he said, 'against the total Contract, the total concept,' or 'the total principle of this Contract'.

"He has emphasized, and I think that is the guts of this case, that an officer of this Union, myself included, has a responsibility accepted under the language of the Contract, the 'good faith section', Section 18⁴ and so forth, to follow the grievance machinery of the Contract and not resort to the extra-curricular means, such as under 17.15, to resolve grievances. In effect, the statement made by the Union today concedes that point." (Exh. 8 to Local 13 Memorandum etc., p. 31)

The preservation of the grievance procedure as part of the continuous collective bargaining process is a proper exercise of the power of the exclusive bargaining representative. The action of the ILWU in agreeing that a longshoreman who engaged in repeated illegal work stoppages rather than utilizing the contract grievance procedure could lose contractual registration rights preserves collective bargaining. A clause so providing is within the "range of reasonableness" in which the collective bargaining agent may lawfully act.

Local 13 has failed to adduce evidence to show bad faith or dishonesty of purpose in the negotiation of the PCLA and in particular § 17.81.

The factual material adduced by Local 13 that it claims shows a violation of the ILWU's duty of "complete good faith and honesty of purpose" is the same material it claims shows the

4. Section 18 of the PCLA provides:

"As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks or subterfuge. The Employers give the same guarantee of good faith observance on their part."

ILWU breached its duty of fair representation in the operation of the grievance procedure. That material even if true would not establish a violation of the duty of "complete good faith and honesty of purpose". A detailed discussion of those allegations is in part III of this brief.

Local 13 has failed to establish its case attacking the terms of 17.81 on two grounds. It has failed to show that the clause, as interpreted by the arbitrator, the PMA and the ILWU, is beyond the range of reasonableness within which the exclusive collective bargaining agent may negotiate an agreement. Furthermore, it has failed to show any bad faith or dishonesty in the negotiation of this section.

III. The evidence adduced by Local 13 is insufficient to raise a material issue of fact regarding improper conduct by the ILWU.

Local 13 in its Points H, I, L and P claims that the district court erred in holding that the factual material adduced by Local 13 did not raise a material issue of fact regarding the bad faith or breach of the duty of fair representation by the ILWU in negotiating the collective bargaining agreement or in administering the grievance procedure. The litigants in the district court engaged in extensive discovery and other pretrial procedures. Local 13 was given extensive opportunity to adduce factual material⁵ in support of its claims of what may be called "Humphrey" discrimination or lack of the *Huffman* "complete good faith and honesty of purpose". (See II, *supra*.)⁶

In its finding of fact 18 the district court found that for the purposes of the motion for summary judgment the various factual

5. See pp. 6-8.

6. We shall hereafter use the terms "*Humphrey* discrimination" and "breach of the duty of fair representation" to refer to the types of improper union conduct that are discussed in *Humphrey v. Moore*, 375 U.S. 335 (1964), *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), and *Vaca v. Sipes*, 386 U.S. 171 (1967). These are discussed at pages 24-27 and 29-30, *supra*.

contentions of Local 13 were true. The district court then concluded in its conclusion of law IV that those factual contentions, even if true, are, as a matter of law, insufficient to establish breach of the duty of fair representation on the part of the ILWU. The district court was correct in its findings and in its conclusions.

In its brief Local 13 does not assert that there are additional facts to show a breach of the duty of fair representation. The issue is whether the facts stated in Finding No. 18 show a breach of the duty of fair representation. The sub-parts of finding 18 are discussed below. We also refer the Court to the Appendix to this brief, in which portions of the district court's Conclusion IV (C.T. 624-636) are set forth. Analysis of the factual material presented by Local 13, even when it is viewed in the light most favorable to Local 13 by assuming it is true in all respects, shows that the district court did not commit prejudicial error in its findings and conclusions.

A. The selection of the arbitrators shows no *Humphrey* discrimination. The arbitrators selected were of the type that the Supreme Court has stated is to be expected and is peculiarly helpful in solving the problems of industrial self-government in accordance with the policy of national labor law. See *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-582 (1960). The action below also accords with the Supreme Court's holdings that the courts are not to substitute their judgment of arbitrators for that of the contract parties. See *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960). In any event, the trial court's findings that the arbitrators are eminently qualified must be sustained. (C.T. 616, 625; App. 1-4)

B. The telephone conversation between Ward and Johnston about "Mickey Mouse" suggests no breach of the duty of fair representation. (C.T. 616, 627; App. 4)

C. The direct participation of Harry Bridges and Paul St. Sure in serious labor relations issues, whether or not coupled with

their reliance on subordinates in less serious issues, indicates no *Humphrey* discrimination. (C.T. 616, 628; App. 4-5)

D. The way PMA proceeded on these grievances and the opinion of Harry Bridges as to how Paul St. Sure carried on labor relations indicates only that PMA felt the issues were significant and that Bridges accurately evaluated the PMA position. This evidence shows acumen on the part of Bridges rather than hostility to Velasquez or Local 13. (C.T. 617, 629; App. 5-6)

E. The alleged conversation between Bulcke and Curt Johnston, in which the arbitrator asked Local 13 officials to live up to his decision as to his jurisdiction to hear all the grievances against Velasquez, shows only an effort to get Local 13 officials to proceed under the contract as it was obliged to do. (C.T. 617, 630; App. 6)

F. The statements of Bridges to Velasquez in April, 1965, show only the candor, the practical realism, the intuitive and knowledgeable judgment, and the sound advice to be expected of an outstanding leader of American labor. (C.T. 617, 631; App. 6-7)

G. The so-called "belly-packing" issue involved many more workers than did the Velasquez issue. (C.T. 203:14-15). If the ILWU determined that it should concentrate on a successful disposition of the "belly-packing" issue and if this meant less success on the Velasquez issue, the only inference to be drawn is that the ILWU attempted to succeed on one issue that was more important to the entire bargaining unit than the other. The district court properly found that in view of the large number of men involved in "belly-packing" ILWU made this decision honestly, in good faith and without any invidious, irrelevant or capricious action. These findings from the facts assumed to be true are clearly supported by them. (C.T. 618, 632; App. 7-8).

H. The statements attributed to the PMA manager that PMA had studied the Velasquez problem carefully and had acted after

such study merely confirms, as does much of the other factual material relied on by Local 13, that this case involved very serious contract violations by Pete Velasquez. (C.T. 618, 634; App. 9)

I. When ILWU acquiesced in the Kagel award, pursuant to action of its longshore caucus, it was "at worst" living up to its contract by acquiescing in a "bad award". The claim of Local 13 that it is flagrantly contrary to union principles to live up to the contract properly fell on deaf ears in the district court. The action of the ILWU reflects only the maturity in labor relations that is required by the policy of our federal labor law policy. (C.T. 618, 634; App. 9-10)

J. The conversation that allegedly took place between the arbitrators, regarding the discharge of Velasquez and his possible rehiring, is without relevance. The district court correctly so held. (C.T. 618, 635; App. 10)

K. The finding as to manifest disregard of the contract and the law, to which Local 13 repeatedly refers, is discussed in other parts of this brief. The "manifest disregard" of the unfair labor practice provisions of the National Labor Relations Act is discussed below at pages 37-38 and 38-43. Other claims of "manifest disregard" of the law and of the contract are discussed below at pages 36-38. (The district court's findings and conclusions are at C.T. 618, 636-638; App. 10-11.)

IV. Finding 18K is not in conflict with Conclusion II.

Local 13 argues that the district court erred, claiming that Conclusion II is in direct conflict with finding 18 K. An examination of the district court's decision shows that there is no conflict. Conclusion II states:

"The award of the Coast Arbitrator, the award of the Area Arbitrator, as well as the decisions rendered throughout all stages of the grievance machinery were and are in complete accordance with the terms of the collective bargaining agreement between employer and union, 'Pacific Coast

Longshore Agreement, 1961-1966', particularly the terms governing the grievance-arbitration procedure.

"Each award and decision, 'reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is.' *Humphrey v. Moore*, 375 U.S. 335, 351 (1964) relying upon *Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963)."

Finding 18 K provides:

"Local 13 has asserted that the ILWU acted arbitrarily, discriminatorily and in bad faith in processing the Velasquez grievance. More specifically, it contends that this conclusion is warranted on the basis of the following factual claims which the Court, taking all facts in the light most favorable to plaintiff and for the purpose of ruling upon the motion for summary judgment, assumes to be and finds to be true:

* * *

"K. That the award manifestly disregards the collective bargaining agreement and the law."

Finding 18K is in no sense a finding that the Kagel award was contrary to the provisions of the agreement specifically referred to in Conclusion II. At most it is a statement that an assumption is being made, to-wit: that the award manifestly disregards some aspects of the collective bargaining agreement and some aspects of the law. The reason for this assumption as to the agreement is explained in Conclusion IV K, where the court states (C.T. 636):

"It is well settled that where the parties to a collective bargaining contract have agreed to submit their disputes to final and binding arbitration, courts will not review the merits of any controversy so decided. . . . Nor will the court substitute its interpretation of the collective bargaining contract for that of the arbitrator."

The other findings made by the arbitrator, to which no exception has been taken by Local 13 (Op. Br. 27-33), fully support the conclusion that the award was "reached after proceedings adequate under the agreement". Accordingly, as in *Humphrey v. Moore*, 375 U.S. 335, 351 (1964) and *Drivers Union v. Riss &*

Co., 372 U.S. 517, 519 (1963), the court below properly held that this award was final and binding, "just as the contract says it is". Under these circumstances, the court's action based on 18 K is merely its correct refusal to substitute its decision as to the meaning of the contract for that reached by the arbitrator.⁷

Local 13 has claimed that there was manifest disregard for the law because the meaning of the contract is a question of law and § 17.81 as interpreted by the arbitrator is in violation of the law (C. T. 505-513) or is a flagrant violation of law (Op. Br. 50-51). In its response to the proposed findings and conclusions submitted by ILWU and PMA, particular reference is made to the National Labor Relations Act's unfair labor practice provisions (C.T. 476-477; 481-497). This claim is restated in the brief before this Court where Local 13 states (Op. Br. 80):

"Had the parties expressed terms of the collective bargaining agreement including the officers in the provisions of Section 17.81... the provisions would have been violative of the Labor Management Relations Act and therefore unenforceable and subject to being terminated..."

In short, Local 13 asserts that to include union officials within § 17.81 "would result in injustice, absurdity and manifest disregard for the law" (cf. Op. Br. 94) and explains this contention at length by asserting that the arbitrator manifestly disregarded the

7. Local 13 mistakenly relies on *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Union*, 359 F.2d 598 (2 Cir. 1966), for the proposition that in § 301 cases courts have the power to, and should, overrule the interpretation placed on the contract by the Coast Arbitrator, the ILWU and the PMA. That case involved a claim that arose under § 303 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 187). It was in no way based on an alleged breach of a collective bargaining agreement and so did not involve § 301. The holding of the court was that the employer was not precluded by the arbitration clause in its collective bargaining agreement from asserting in district court a claim of tort damages based on the alleged secondary activity of the union (see 359 F.2d at 600).

provisions of the National Labor Relations Act defining unfair labor practices (see Op. Br. 49-68; 72-74). The court below properly concluded, in this regard, that neither the arbitrator nor the courts will exercise the Labor Board's exclusive jurisdiction as to unfair labor practice claims (see V, *infra*).

The best indication of what Local 13 means by its many repeated references to "manifest disregard of . . . the law" and what the court meant in finding 18K is found in Local 13's references to such cases as *Wilko v. Swan*, 346 U.S. 427 (1953). Local 13 states (Op. Br. 50) that *Wilko* held "that a manifest disregard for the law is . . . a ground for setting an award aside" by judicial action. The lower court disposes of this argument in Conclusion IV K on the basis that the Supreme Court has specifically held the holdings of such cases to be "irrelevant" to judicial consideration of arbitration awards under collective bargaining contracts. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 at 578 (1960), quoted at page 19, *supra*. The district court, by its findings 18 K and its Conclusion IV K, has simply held that *Warrior & Gulf*, and not *Wilko*, is controlling in the instant case.

V. The jurisdiction of the district court to consider the claim that the PCLA or the awards violate the Labor Management Relations Act, 1947, as amended is pre-empted by the jurisdiction of the National Labor Relations Board.

Local 13 in its Points D-1, D-2, D-3, E and F asserts that the district court erred on the ground that the contract is unlawful under the National Labor Relations Act because it permits a union's business agent to be discharged from his job in the bargaining unit for violating the contract while working as a business agent and that the award is unlawful because it deregistered Pete Velasquez for his contract violations while working as a business agent. Local 13 refers to the unfair labor practice provisions of this Act.

The NLRB has primary jurisdiction to hear all charges that assert, even arguably, unfair labor practices as defined in §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158. The statutory jurisdiction of the Board is exclusive and pre-empting. The leading case defining this doctrine of pre-emption is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959). The *Garmon* rule has been applied consistently by the United States Supreme Court. *Plumbers, Steamfitters, etc. v. County of Door*, 359 U.S. 354 (1959); *Marine Engineers Beneficial Association v. Interlake S.S. Co.*, 370 U.S. 173, 174, 176-177 (1962); *International Association of Bridge, etc. Workers v. Perko*, 373 U.S. 701, 706 (1963); *Hattiesburg Building & Trades Council v. Broome*, 377 U.S. 126, 127 (1964).

The Supreme Court in *San Diego Building Trades Council v. Garmon*, supra, 359 U.S. 236, 240-243 (1959), discusses at length the expertise of the Labor Board and its exclusive jurisdiction. It then quotes from *Garner v. Teamsters, C & H Local Union*, 346 U.S. 485, 490-491 (1963), on the role of the Labor Board in administering the National Labor Relations Act:

“Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . .”

The assertions of unfair labor practice are patent. In the proposed pretrial order Local 13 contended the following:

"5. That by reason of the foregoing deregistration, Pete Velasquez was further deprived of his pension, welfare, mechanization and severance rights; that the deregistration against Pete Velasquez was for alleged activities while he was a Union official and contrary to the National Labor Policy. (C.T. 306: 24-28)

"6. That the aforesaid deregistration had the effect and purpose of interfering with and restraining plaintiff and its members in their right of self-organization and to bargain collectively through representatives of their own choosing or engage in other concerted activities for their mutual aid and benefit and was contrary to the National Labor Policy. (C.T. 306: 29-307:2)

"7. That the award deregistering Pete Velasquez had the purpose and effect of modifying and changing the Pacific Coast Longshore Agreement contrary to the National Labor Policy. (C.T. 307: 3-5)

* * *

"25. That the awards or decisions of the Coast and Area Arbitrator were against the National Labor Policy and contrary to the provisions of the National Labor Relations Act. (C.T. 308: 24-26)

* * *

"31. That prior lockouts of Local 13 members by the PMA had a coercive effect upon Local 13 and upon any agreement entered into by or between Local 13 and the PMA on December 8, 1964, or subsequent in respect to the arbitration proceeding appealed from and the motion to deregister Pete Velasquez. (C.T. 309: 14-18)

* * *

"45. The manner in which Pete Velasquez and Local 13 has been damaged by the Arbitration Award and the deregistration and how it has hampered and impaired plaintiff from operating as a labor organization." (C.T. 311: 3-6)

These are the same claims being raised before this Court. Contentions number 5, 6, 25 and 45 claim that the awards and the

resulting deregistration violate the National Labor Relations Act. In its contention 7 Local 13 claimed that the collective bargaining contract between PMA and the ILWU violates the National Labor Relations Act. Finally, in its contention 31 Local 13 claimed that other unrelated conduct of PMA violates the National Labor Relations Act. Hence, without regard to the substantive merit of these claims, it is clear under the principles announced in the *Garmon* line of cases that the district court did not err in failing to consider the claims made in Local 13's contentions of fact, numbers 5, 6, 7, 31 and 45.⁸

If the court did have jurisdiction and if it followed the decision of the National Labor Relations Board it would conclude that such a deregistration was not an unfair labor practice. It is conceded that the deregistration was based in part on incidents that occurred while Velasquez was acting as union business agent. Whether those incidents amounted to contract violations was an issue within the exclusive jurisdiction of the arbitrator. He held that they were violations. If the court could hear the issue at all it would be whether it is an unfair labor practice to deregister a registered longshoreman who repeatedly violated the collective bargaining contract where such violation occurred in part while the registered longshoreman was acting as union business agent. The NLRB has held that such a deregistration would be lawful.

In *Crucible Steel Castings Company*, 101 N.L.R.B. 494, the Board said at p. 495:

"Flagg was the shop chairman, authorized to present grievances at the second stage of the grievance procedure set forth in the collective bargaining contract with the Respondent. Flagg had persisted, however, on numerous occasions in

8. These contentions do not raise issues for the court under *Smith v. Evening News*, 371 U.S. 195 (1962). There is no element of contract violation theory in any of these claims. Accordingly, they do not fall within the *Smith v. Evening News* doctrine as to § 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185.

handling grievances in a manner contrary to the contract provisions as well as in violation of posted shop rules, and had been repeatedly criticized and warned by his foreman for such infractions. On the day of his discharge he had injected himself into the processing of a grievance prematurely, and was outside his department in violation of shop rules. Although twice instructed by his foreman to return to his department and to his work, he refused and was discharged. In view of Flagg's violation of shop rules, his refusal to comply with his foreman's direction to return to work, and, particularly, his persistence in disregarding the provisions in the contract for handling grievances, we find that Flagg's discharge was not in violation of Section 8(a) (3) and (1) of the Act. We shall therefore dismiss the complaint." (101 N.L.R.B. at 495)

Velasquez engaged in conduct similar to that of Flagg. He engaged in illegal work stoppages in disregard of the contractual grievance procedure. Deregistration was lawful.

Local 13 asserts in its opening brief that the arbitrators' decisions have the effect of depriving Local 13 membership to officials of its own choosing (Op. br. 62). This argument is based on the fact that the Local 13 Constitution states that only an "active longshoreman in the industry" may run for office in Local 13. (Op. br. p. 5-6) Apparently Local 13 interprets its constitution as requiring registration status under the contract as the proof of being an "active longshoreman" eligible for union office.⁹ Under this view each deregistration decreases the number of "active longshoremen" and thereby decreases the number of persons eligible to run for office. Were the Court to adopt Local 13's argument then no deregistration would be lawful. Putting the proposition into

9. Local 13 has voluntarily limited its representatives to those with registration status. Its rules, not the arbitration award, deprives it of the use of Pete Velasquez as an official.

ordinary industrial terms, it would always be illegal to discharge any longshoreman.¹⁰

VI. The complaints against Velasquez were arbitrable under the grievance-arbitration procedure of the Pacific Coast Longshore Agreement.

Local 13 contends in its Points C, H-2 and J that the district court erred in refusing to hold that the grievances involving conduct of an individual while acting as a union business agent were not arbitrable. Local 13 points out, correctly, that several of the grievances against Pete Velasquez involved incidents that occurred while he was serving as union business agent. It claims that this fact makes those disputes not arbitrable. In support of this position Local 13 advances two arguments.

First, Local 13 argues that because Velasquez was not employed under the Pacific Coast Longshore Agreement during the time he was acting as a union official there is no basis for an action against him under that agreement for conduct during that period. This argument ignores the fact that during the entire time Velasquez was acting as a union business agent he retained his contractual registration status (C.T. 613: 17-22). He held his job as a longshoreman because he held this status. *Matson Terminals, Inc. v. Cal. Emp. Com.*, 24 Cal. 2d 695 (1944). It was this contractual employment status that he lost in the grievance procedure. The arbitrator did not remove Velasquez from

10. The foregoing answers Local 13's contentions that courts should determine whether unfair labor practices have occurred. Local 13's brief generally does not refer to unfair labor practices in violation of the National Labor Relations Act, but rather it refers to violations of the Labor Management Relations Act in general terms. Its brief indicates that Local 13 relies on the unfair labor practice sections, §§ 7 and 8, 29 U.S.C. §§ 157 and 158, found on the National Labor Relations Act, 29 U.S.C. §§ 151, et seq. This act is a portion of the Labor Management Relations Act, 29 U.S.C. §§ 141, et seq. Local 13 relies on only § 301(b), 29 U.S.C. § 185(b), of the remainder of the Labor Management Relations Act. (See Op. Br. 49-72.) Its argument based on § 301(b) is answered in part IV of this brief.

his union employment for his violations of the contract. The arbitrator ordered Velasquez discharged from his PMA employment because he had caused repeated illegal work stoppages in violation of the contract.

Second, Local 13 also argues that the question of arbitrability is for the courts to decide and that in this case the district courts should have ruled that the disputes involving Pete Velasquez were not arbitrable because of the narrowness of the arbitration clause of the Pacific Coast Longshore Agreement. The question of arbitrability is ultimately for the court but in this case that court function is fulfilled by merely noting the very broad scope of the grievance arbitration provisions. The lowest level of the procedure has jurisdiction "To investigate and adjudicate all grievances and disputes according to the procedure outlined in this Section 17." (17.124) Further "In the event that the Employer and Union members of any Joint Port Labor Relations Committee shall fail to agree upon any question before it, such question shall be immediately referred at the request of either party to the appropriate Joint Area Labor Relations Committee for decision." (17.24) Similarly any matter not resolved by the Joint Area Labor Relations Committee may be referred by either party to the Area Arbitrator. Decisions of the Area Arbitrator claimed by either party to conflict with the agreement may be referred to the Joint Coast Labor Relations Committee (17.261). Section 17.27 provides:

"In the event that the Employer and Union members of the Joint Coast Labor Relations Committee fail to agree on any question before it, including a question as to whether the issue was properly before the Coast Labor Relations Committee, such question shall be immediately referred at the request of either party to the Coast Arbitrator for hearing and decision, and the decision of the Coast Arbitrator shall be final and conclusive."

The nature of the grievance-arbitration procedure is further shown in § 17.53 which provides: "The arbitrators shall have power to pass upon any and all objections to their jurisdiction."

In the foregoing provisions the parties to the agreement, the ILWU and PMA, have shown a clear intent to process all disputes through the grievance-arbitration procedure.

The contention that Local 13 did not specifically agree to arbitrate eight of the issues before the Area Arbitrator is not relevant. ILWU, not Local 13, is the exclusive representative for collective bargaining purposes. ILWU agreed to arbitrate these issues when it entered into the collective bargaining contract. Furthermore, the Joint Coast Committee minutes relating to the Velasquez grievance state, "The Coast Committee agrees the matter is before the Coast Committee on the ten rulings of violation of Section 17." (C.T. 670). ILWU thereafter appeared before the Coast Arbitrator regarding the conduct of Velasquez and the penalty applicable under the contract. It is clear that ILWU and PMA "did agree to give the arbitrator power to make the award he made".¹¹

There is a further reason why Local 13's case is without merit in this area. In the present proceeding officials of Local 13 objected to the arbitrator's jurisdiction at the area level. This raised an arbitrable question under § 17.53. The area arbitrator ruled that he did have jurisdiction (C.T. 614:31-32). Officials of Local 13 refused to participate in the arbitration (C.T. 614:25-29). Officials of Local 13 referred the ruling of the area arbitrator on the merits to the Joint Coast Labor Relations Committee (C.T. 615:9-10). The issue of jurisdiction of the area arbitrator was not raised at either of the upper two levels (C.T. 615:1-2). The claim that the area arbirtator did not have jurisdiction has been waived or in the alternative is not ripe for determination by the court because the grievance procedure has not been exhausted. *Woody v. Sterling Aluminum Products, Inc.*, 365 F.2d 448 (1966).

11. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), where the Court stated:

"[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."

VII. The arbitration awards are not an improper modification of the PCLA.

Local 13 asserts that the position of the ILWU and PMA that § 17.81 applies to business agents is a modification of the contract and as such is invalid because it is not in accordance with the contractual procedures for modification and not in accordance with § 8d of the National Labor Relations Act as amended.

Even if the interpretation of § 17.81 agreed to by the ILWU and PMA were a modification of the contract the provisions of § 8d of the NLRA as amended would have no bearing. That section does not forbid contract modification consented to by the exclusive bargaining representative and the employer. The section defines the duty to bargain in good faith, the breach of which is an unfair labor practice. Furthermore, this section deals solely with bargaining in good faith at the end of the contract term. Thus, it is clear the § 8d is inapplicable as a matter of substantive law, as well as being within the exclusive jurisdiction of the Labor Board and so not properly to be considered by the district court in any § 301 action that could be brought if we assume there was a modification of the contract.

The interpretation of § 17.81 was not a modification of the contract. The contract always had that meaning. At the arbitration at the coast level Mr. Fairley, the Union spokesman, stated that "The legal question is whether officers of the Union are covered by the provision of the Contract and can be held for purported violation of the Contract. . . ."

"We are not contesting the first point, the legal point. It seems to us to be true that the Contract read as a whole is not subject to any other interpretation than the one given by the Employer." (Exhibit 7 to Local 13's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.)¹²

12. "In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." (*Vaca v. Sipes*, 386 U.S. 171 at 194 (1967).)

Because the interpretation of § 17.81 was not a modification of the agreement and because the arbitrator acted on the basis of his interpretation of the contract (C. T. 675; See *supra*, p. 5), the modification provision is not applicable.

VIII. The arbitration awards are not an assessment of damages against an individual.

Local 13 contends in its Point D-4 that the arbitration awards violated § 301 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185) because the awards assessed damages against a union official. That section has no application to the awards here because neither award is a "money judgment" under the Act. Local 13 argues that if illegal work stoppages occurred "the union was liable" (Op. br. p. 70), and deregistering Velasquez placed the union's liability upon him as an individual and will deprive him of future earnings and benefits which is the same as assessing damages against him.

Section 301 provides in part: "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets and shall not be enforceable against any individual member or his assets." The section applies not only to union officials but also to union members. Under Local 13's theory it would be illegal to discharge a union member employee because to do so would always deprive that person of future earnings and thus be an assessment of damages against him. Simply stated there was no money judgment.

IX. Finding No. 19 is in accordance with law and is supported by the evidence.

Local 13 in its Point Q argues that the district court's Finding No. 19 is contrary to law and not supported by the evidence. Finding No. 19 is not contrary to law and is fully supported by evidence. Finding No. 19 provides:

“The allegations contained in Local 13’s amended complaint, to the extent that they are inconsistent with the Findings of Fact herein are untrue.”

We submit that the issues raised in this point are repetitious and are covered above.

X. Local 13's amended complaint fails to state a cause of action upon which relief can be granted.

Local 13 argues in its Point N that the district court erred in Conclusion V, which states that the amended complaint failed to state a cause of action upon which relief could be granted. The record before the district court clearly shows that the amended complaint did so fail. The record shows that Local 13 failed to plead and prove the elements of its case.

The premises are simple. The district court correctly held that one necessary element was breach of the duty of fair representation on the part of the ILWU. The district court correctly found that if all of Local 13’s factual material were true, it would not establish a breach of the duty of fair representation. This finding requires the conclusion that the amended complaint does not state a claim upon which relief may be granted. The district court did not err in so holding.

XI. Summary judgment denying relief to Local 13 and confirming arbitration award of June 29, 1965 was proper.

Local 13, in Points M and O urges that the district court erred in granting summary judgment in favor of PMA and ILWU, which denied any relief to Local 13, because they did not adduce any factual material in support of their motion for summary judgment. For such support, ILWU and PMA relied upon answers to interrogatories, requests for admissions, affidavits submitted by Local 13, and the other material in the record. They found sufficient competent matter in the material submitted by Local 13. No conflicting factual material was presented to the district court. The court looked at the factual material submitted

by Local 13 in the light most favorable to it, by assuming it to be true in all respects. Thereupon it used discretion only in evaluating the facts in relation to the applicable law. The record shows that ILWU and PMA fully met the burden showing that Local 13's petition to set aside the award of the arbitrator was without merit, simply on the basis of the factual contentions presented by Local 13.

The elements that must be shown to confirm an arbitration award are the existence of an agreement to arbitrate, the holding of the contemplated arbitration and the issuance of an award by the arbitrator. (See e.g. Calif. Code of Civ. Proc. § 1285.4.) These facts have been stipulated to by the parties. The agreement to arbitrate is contained in § 17 of the PCLA. The arbitration was held on April 28, 1965. An award was issued on June 29, 1965.

Local 13 has interposed certain defenses. Those defenses are held to be without merit. Accordingly, summary judgment confirming the awards is proper.

CONCLUSION

Local 13 has sought to attack the contract negotiated by the exclusive bargaining representative of longshoremen, the ILWU. It has also sought to set aside the result reached in the grievance-arbitration process in which the exclusive bargaining representative, the ILWU, acted on behalf of the union and the employee. To prevail on either score, Local 13 must plead and prove that the ILWU acted in bad faith or in breach of its duty of fair representation. Local 13 has failed to submit any evidence that would prove such wrongful conduct by the ILWU. Accordingly, the district court did not err in granting its summary judgment refusing to vacate the arbitration awards. In turn, in the absence of any valid ground for setting aside the award, the district court

correctly granted its summary judgment confirming and enforcing the Opinion and Decision of Sam Kagel dated June 29, 1965.

We respectfully ask that the judgment of the district court be affirmed.

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Appendix

Excerpts from Conclusion IV of the district court.*

(C.T. 624-638)

278 F.Supp. 755, 767-773

In taking up each of the factual claims which the Court has assumed to be and found to be true in Finding of Fact 18 above, the Court concludes as follows:†

A. *The ILWU did not breach its duty of fair representation by its acts in selecting the arbitrators.*

Plaintiff asserts a *Humphrey* discrimination on the ground that Germain Bulcke, the Area Arbitrator, and Sam Kagel, the Coast Arbitrator, were selected as arbitrators by the presidents of PMA and the ILWU, J. Paul St. Sure and Harry Bridges respectively. While Local 13 did participate in selecting the area arbitrator prior to 1960, this authority was withdrawn by Section 17.51 of the contract which provides that the designation of arbitrators thereafter is to be made by the parties to the agreement, PMA and the ILWU.

This method of selecting the arbitrators is not attacked. Instead, plaintiff asks this court to substitute its judgment regarding the qualifications of the arbitrators for the judgment of the parties who have agreed to submit their disputes to those particular arbitrators. Clearly the Court should not do this. See *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

In any event the record demonstrates that the arbitrators are eminently well qualified. The admissions in the pretrial confer-

* Substantial portions of the Conclusion have been omitted, as indicated. Also some minor changes have been made in the Conclusion as filed, such as punctuation, tense, omission of footnotes, use of italics and words in conformity to the brief, and insertion of some record references.

† The district court stated, C.T. 619:4-7:

"The following Conclusions of Law, insofar as they may be concluded Findings of Fact, are so found by this Court to be true in all respects. From the foregoing facts, the Court concludes that:"

ence order show that Germain Bulcke became area arbitrator for Southern California in 1960 (C.T. 303: 1-5) and that during the period Germain Bulcke has served as area arbitrator he rendered awards in a substantial number of controversies. (C.T. 303: 15-17) They further show that during and after the Velasquez controversy Local 13 has not sought to disqualify Bulcke from further service as area arbitrator. Admitted facts Nos. 26, 27 and 28 (C.T. 303: 1-14) in the pretrial conference order indicate that Germain Bulcke had a long history of experience in the stevedoring industry on the Pacific Coast, including working as a longshoreman and administering the collective bargaining contracts as an officer of Local 10 and as vice president of the ILWU. The fact that Germain Bulcke was eminently well qualified to consider and resolve disputes arising out of the Pacific Coast Longshore Agreement in no fashion shows a lack of fair representation of Pete Velasquez or Local 13 by the ILWU.

Similarly, Local 13 is attacking the appointment of Sam Kagel as Coast Arbitrator. The court may take judicial notice of the significant facts. Local 13 does not assert that these facts are untrue. He is a full professor at the school of law at the University of California at Berkeley (Boalt Hall) and a noted writer in the field of arbitration law. Professor Kagel served on the California Law Revision Commission that drafted the Arbitration Act that was enacted by the California State Legislature and codified in Civil Code of Procedure, Section 1280, et seq. Professor Kagel has served as arbitrator in numerous labor disputes arising in a wide variety of industries including the recent dispute involving the agricultural workers in the central California valleys. Admissions 31, 32 and 33 (C.T. 303: 21-30) indicate that Professor Kagel has rendered a number of decisions in disputes arising under the PCLA and that Local 13 has not sought to disqualify Sam Kagel from further service as Coast Arbitrator. Clearly the ILWU did not breach its duty of fair representation

by participating in the selection of Professor Kagel as the final arbitrator in labor disputes arising in the stevedoring industry on the Pacific Coast of the United States.

It should be noted that Local 13 concedes that it failed to initiate steps to disqualify Bulcke as an arbitrator following his decision to deregister Velasquez (C.T. 303: 18-20). In view of the fact that Bulcke was appointed in 1960 pursuant to the 1960 revisions in the grievance procedure and had participated in the resolution of numerous disputes from the time of his appointment until September, 1966, Local 13's familiarity with Bulcke and the manner in which he discharged his appointed duties compel the observation and conclusion that objections to Bulcke, as well as to Kagel, if Local 13 had any, should have been made at a time earlier than in these proceedings. Under such circumstances, neither the method of appointing arbitrators nor the change in the manner of their appointment can imply a *Humphrey* discrimination in the union's representation of Velasquez's grievance.

As a further basis for suggesting that the ILWU breached its duty of fair representation, Local 13 charges that the arbitrators in this instance were personally known to the presidents of PMA and the ILWU. The court must reject such an argument in view of the reasons set forth in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). Recognizing that a labor arbitrator's source of law includes the practices of the industry and the shop—the industrial common law—as well as the express provisions of the collective bargaining agreement, the Supreme Court observed that an arbitrator is usually chosen on the basis of the parties' confidence in his familiarity with the problems inherent in the particular industry in the process of industrial self-government, and because of their expectation that his resolution of a particular grievance will reflect factors other than those expressly set out in the contract. Contrary to the allegations advanced by Local 13, *Warrior and Gulf* suggests that it

is unrealistic to expect that parties to a collective bargaining contract would surrender the arbitration responsibilities to persons with whom they are not acquainted.

- B. *The ILWU did not breach its duty of fair representation by referring to Velasquez as "Mickey Mouse" and by offering to handle "extended shift" problems at the Coast or San Francisco level rather than the local level.*

Local 13 charges that Mr. Bill Ward, an officer of the ILWU, had a telephone conversation with Mr. Curt Johnston, then the president of Local 13, in November, 1964. Ward's inquiry about "Mickey Mouse", a common nickname for Velasquez, prompted a discussion of the issue of working extended shifts in view of Velasquez's association with this problem as a union officer and as a working longshoreman. Johnston commented that the problem still existed, and Ward responded that the ILWU would handle that situation as well as "the mouse" at its San Francisco office. It is difficult to conclude that anything short of a distorted interpretation of this conversation would tend to establish that the ILWU officer's comments amounted to hostility toward one of its members or other breach of the duty of fair representation.

- C. *The ILWU did not breach its duty of fair representation by having its president attend or not attend local labor relations committee meetings.*

Local 13 has suggested that the ILWU breached its duty of fair representation because the president of PMA and the president of the ILWU did not customarily attend local labor relations committee meetings in Southern California but did attend the one on December 8, 1964, involving Velasquez's work stoppage on the S.S. President Quezon.

The organization and operation of the grievance procedure is set out in § 17 of the PCLA. It provides for numerous first

step port grievance solving committees and for four area grievance solving committees. It is readily apparent that the president of the ILWU and the president of PMA could not and should not participate on a routine basis in the operation of these local committees. On the other hand, at critical times when large issues are at stake, one would ordinarily expect the chief executive officers of these organizations to interest themselves personally in local issues. The fact that the ILWU used its top official to represent Local 13 or Pete Velasquez in handling a grievance in no way implies that the ILWU breached its duty of fair representation in handling that grievance.

In view of the contract's coverage of longshore work in California, Oregon and Washington, it would be unrealistic to expect these officers to participate in the meetings of local committees on a routine basis. The attendance of the chief executive officers of these organizations at the meeting that considered the charges against Velasquez, conducted after a work stoppage in which Velasquez, as a working longshoreman, refused to comply with an Area Arbitrator's on-the-job interim award, clearly indicates that they considered the grievance to be of particular importance. This Court is unable to draw any conclusion from the ILWU president's personal participation in the proceedings other than one indicating an interest in discharging his union's responsibility toward those within the bargaining unit.

D. *The ILWU did not breach its duty of fair representation in evaluating PMA's proposals regarding the procedural handling of the Velasquez complaints.*

Local 13 asserts that Paul St. Sure, president of PMA made certain proposals regarding the procedural handling of the Velasquez complaints. Local 13 further asserts that the ILWU breached its duty of fair representation because it stated to Local 13 and officers of Local 13 at that time in a private caucus that Mr. St. Sure was a determined man when he had taken a hard and fast

position. Quite obviously Mr. Bridges' evaluation of Mr. St. Sure, a man with whom he had frequent dealings for over twelve years, could hardly be said to be a breach of the ILWU's duty of fair representation.

- E. *The ILWU did not breach its duty of fair representation by reason of the telephone conversation between Curt Johnston and Germain Bulcke on January 4, 1965.*

Local 13 asserts the impropriety of a lengthy telephone conversation between Bulcke, the Area Arbitrator, and Curt Johnston, then the president of Local 13, at the conclusion of the first day of the arbitration hearing. More specifically, it complains that, in encouraging Local 13 to continue with the arbitration and present a case in defense of Velasquez, Bulcke stated, "We know Pete Velasquez is guilty and he is going to have to receive some kind of penalty." It is indeed difficult to conclude that these comments tend to demonstrate in any way that the ILWU breached its duty of fair representation or engaged in a *Humphrey* type discrimination. Such statements, which in effect urged Local 13 to present the best possible case in behalf of one of its members, compel the conclusion that the Arbitrator was urging that the Union make an honest effort to serve the interests of each of its members without hostility or discrimination in spite of the futility of such an undertaking.

- F. *The ILWU did not breach its duty of fair representation because of the statement made by the president of the ILWU in April, 1965.*

Local 13 asserts that Velasquez and Harry Bridges, president of the ILWU, engaged in a conversation at an ILWU caucus in April, 1965, in which Bridges emphatically criticized Velasquez' conduct, stated that the probable outcome of the Coast Arbitration would be his deregistration, and commented that he was the only person who would be able to help Velasquez in

that event. In view of the Area Arbitrator's earlier finding that Velasquez was guilty of ten of the twelve charges presented, it is not at all surprising that Bridges was able to predict accurately that the Coast Arbitrator would order Velasquez' deregistration. The additional assertion that Bridges alone would be in a position to help Velasquez in the event that he was deregistered was no more than a statement of the realities of organized labor. Admittedly the statements and predictions by Bridges were sternly issued and to the point, but it is not unrealistic to expect such candor between the president of a union and one of its members. It is a complete distortion to construe the comments as hostile or intimidating so as to come within the scope of *Humphrey v. Moore*, *supra*.

* * *

G. *The ILWU did not breach its duty of fair representation by its handling of the "belly-packing" issue.*

Local 13 complains that the ILWU in effect "dumped" Velasquez' grievance in favor of another matter then in the grievance process. More specifically, it complains that the president of the ILWU made certain statements from which it could be inferred that the international union was more interested in a favorable disposition of the "belly-packing" problem than of the issue of subjecting a union official to deregistration for repeated contract violations.

But this Court is not prepared to find a breach of the collective bargaining agent's duty of fair representation in its support of the position of one group of employees contrary to the interests of an individual worker whom it also represents. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) the Supreme Court found that the union had not breached its duty of fair representation in agreeing to an amendment of an existing collective bargaining contract, granting increased seniority to a particular group of

employees and resulting in layoffs which otherwise would not have occurred.

“Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.”
Id., at 338.

Conflicts between employees represented by the same union are to be expected, but to preclude the union from exercising its discretion in an instance such as this would only weaken the collective bargaining process and the grievance machinery. The record before this Court indicates that the ILWU, in acting to benefit the largest possible number of employees in the bargaining unit, made its election honestly, in good faith and without hostility or arbitrary discrimination. Accordingly, we are unable to conclude as a matter of law that the ILWU breached its duty of fair representation merely because it determined that a resolution of the “belly-packing” issue was more important to the bargaining unit than the Velasquez grievance.

There are no facts asserted, alleged or claimed that the choice was made by hostile or arbitrary discrimination or by dishonest or unfair motives or by any invidious, irrelevant or capricious action. In fact, the propriety of the ILWU’s action, if it did what Local 13 says it did, is clear from Local 13’s assertion that the choice in favor of the belly-packing issue was made because it involved more employees and was more important to the whole body of employees in the bargaining unit than the business agent issue.

H. *The ILWU did not breach its duty of fair representation by reason of the fact that PMA carefully considered its decision to press its complaints against Velasquez and seek his deregistration for violations while serving as a union business agent.*

Local 13 asserts that PMA's manager for the Southern California area commented that PMA's course of action—to pursue its complaints against Velasquez through the grievance procedure in an attempt to deregister him—was determined only after careful consideration. The short but effective answer to this line is that PMA was merely analyzing its labor relations policies, considering the effect of the implementation of those policies in this situation, and treating the Velasquez grievance as an important matter. The fact that PMA carefully considers its labor relation policies and the implementation of those policies in no way tends to show that the ILWU breached its duty of fair representation to Local 13 or Pete Velasquez.

I. *The ILWU did not breach its duty of fair representation by acquiescing in the Kagel arbitration.*

Local 13 contends that the Kagel award was “flagrantly against Union principles” so that the acquiescence in it by the ILWU, the ILWU caucus of longshore locals and Harry Bridges, was a breach of ILWU's duty of fair representation. . . . No court is in a position to say that it has the expertise to evaluate collective bargaining strategy and union principle better than Harry Bridges and the entire longshore caucus of the ILWU.

* * *

Plaintiff charges only that the ILWU is living up to its contract, for it provides that the arbitrator's award is final and binding in resolving disputes between the employees and the employers. To accept a “bad award”, if it is assumed that the Kagel award is a “bad award”, cannot be said to show hostile or arbitrary discrimination or dishonest or unfair motives or invid-

ious, irrelevant or capricious action." "[A] breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious . . ." *Vaca v. Sipes*, supra, at 195. If anything can be inferred from an honorable acquiescence in the award of the Arbitrator, it is maturity in labor relations.

J. *The ILWU did not breach its duty of fair representation because of a conversation between Germain Bulcke and Professor Kagel after the Kagel award.*

Local 13 makes claims that the ILWU breached its duty of fair representation because Area Arbitrator Germain Bulcke talked to Coast Arbitrator Professor Sam Kagel after the decision of Kagel and stated that he, Germain Bulcke, was surprised at the severity of the penalty imposed by Professor Kagel. Local 13 further claims that Bulcke suggested that Kagel approach Bridges to see if Bridges would negotiate with St. Sure regarding reregistering Velasquez. These claims, if factual, have no relevance or materiality to the question of whether or not the ILWU breached its duty of fair representation of Local 13 or Pete Velasquez.

K. *The claim that the award is in manifest disregard of the collective bargaining agreement and the law does not raise any breach of ILWU's duty of fair representation.*

It is well settled that where the parties to a collective bargaining contract have agreed to submit their disputes to final and binding arbitration, courts will not review the merits of any controversy so decided. Particularly, the court will not rehear or reweigh the evidence offered at the arbitration hearing. Nor will the court substitute its interpretation of the collective bargaining contract for that of the arbitrator. These principles have been stated by the United States Supreme Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960);

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

* * *

Clearly, the parties to the PCLA intended the grievance procedure with final and binding arbitration would be the exclusive method for resolving disputes arising under that agreement.

Moreover, this Court is compelled to conclude that Section 11 of the Agreement expressly states the parties' intention, including the ILWU and its locals, that there shall be no work stoppages for the life of the agreement and that, in the event of a grievance or dispute, the work shall continue in accordance with the Agreement. And, as we have already seen, the grievance procedure set forth in Section 17 of the Agreement is the exclusive remedy for resolving all disputes or grievances.

In view of the strong public policy in favor of utilizing grievance procedures to resolve disputes as well as the express language in the Agreement forbidding strikes or work stoppages, the commitment made by the ILWU in acquiescing in the award disciplining Velasquez for initiating and participating in work stoppages is clearly within the permissible area of a bargaining representative's discretion. Moreover, Local 13 has been unable to produce or cite any authorities suggesting that it is improper for unions to enter into commitments preventing work stoppages or subjecting those who participate in such disruptive activities to disciplinary action.

Accordingly, and since the power of this Court to review the Arbitrator's award here at issue is limited by the rules enunciated in the cases cited above, we must conclude that plaintiff has not stated, alleged or claimed any facts whatsoever that would establish a cause of action for collateral attack upon the grievance procedure followed in this case and particularly upon the awards of the Coast Arbitrator and Area Arbitrator.

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No. 22,670

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, a labor organization,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a California non-
profit corporation, and INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION, a labor organ-
ization,

Appellees.

APPELLANT'S CLOSING BRIEF.

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FOR THE NINTH CIRCUIT

LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, a labor organization,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a California non-
profit corporation, and INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION, a labor organ-
ization,

Appellees.

APPELLANT'S CLOSING BRIEF.

Prefatory Statement.

The divions and subdivisions of the argument herein are numbered so as to coincide with the same numbering used by Appellees in their counter-part to the Point. The exception is Point IX hereof, which includes therein Points IX, X and XI of Appellees' brief.

ARGUMENT.

I.

REPLYING TO APPELLEES' POINT I AND THE SUBDIVISIONS THEREUNDER, JURISDICTION UNDER SECTION 301(a) OF THE NATIONAL LABOR RELATIONS ACT CARRIES WITH IT, IN REGARD TO ARBITRATIONS, THE RIGHT OF REMEDY PROVIDED BY THE UNITED STATES ARBITRATION ACT, 9 U.S.C. SECS. 1 ET SEQ.

- a. The Substantive Law to Be Applied in Relation to the Jurisdiction Provided by Section 301(a) Is the United States Arbitration Act.

Appellant's position is not that the source of the lower court's jurisdiction, in regard to the application of the *United States Arbitration Act*, 9 U.S.C. Secs. 1-10, was other than that provided by Section 301(a) of the *Labor Management Relations Act*. Appellant's position is that once jurisdiction attaches that in regard to arbitration matters, the remedies provided for by the *Arbitration Act*, or remedies analogous to those of the *Arbitration Act*, are applicable.

Neither the case *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) or *General Electric Co. v. Local 205* (1957) cited by Appellees, alters the situation. Each of such cases was decided the same day, and as set forth in the *General Electric Co.* case, *supra*, were "companion" cases, with the *General Electric* case relying upon the decision in the *Textile Workers* case, *supra*. The issue involved was whether or not the Norris La Guardia Act barred enforcement of Arbitration Agreements. The court in the *Textile Workers'*

case, *supra*, did not confine the law which is applicable under Section 301 to common law; in discussing the law to be applied, the court, at page 457, stated:

“But State law if compatible with the purpose of Sec. 301, may be resorted to in order to find the rule that will best effectuate the federal policy (citation). Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.”

The court continued at page 458:

“* * * We see no justification in restricting Sec. 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of the Act.”

The Court in *Textile Workers Union v. Lincoln Mills of Alabama*, *supra*, arrived at the foregoing after reviewing, at pages 455 and 456, the legislative history of Section 301, which provided that the section contemplated, not only law suits for damages, but other remedial proceedings, both legal and equitable, including suits of interested individual employees under the *Declaratory Judgments Act*.

The applicability of the *United States Arbitration Act* to arbitrations involving collective bargaining agreements has been discussed and sustained in the Circuit Courts. In *Mogge v. District No. 8, International Ass'n. of Machinists* (7th Cir. 1967), 387 F. 2d 880, 883, the Court stated:

“District No. 8's argument that the United States Arbitration Act is inapplicable is foreclosed in this Circuit by *Pietro Scalzitti v. International Union of Operating Engineers*, 351 F.2d 579, 579-580 (7th Cir. 1965).”

In *Local Union No. 11 International Brotherhood of Electrical Workers v. G. P. Thompson Electric Inc.* (9th Cir. 1966), 363 F. 2d 181, 182, the cross motions which went up on appeal were “based on Sec. 9 of the United States Arbitration Act.”

See also: *American Machine and Foundry Co. v. United A., A., & A., Implement Workers*, 256 F. Supp. 161, affirmed 329 F. 2d 147 (2d Cir. 1964). *Local 205 United Electrical, Radio and Machine Workers of America v. General Electric Company*, 233 F. 2d 85, 100 (1st Cir. 1956).

The legislative intent was that Section 301 would encompass proceedings both legal and equitable, and forms of relief previously provided by Congress. The *United States Arbitration Act* encompasses the rule that will best effectuate the National Labor Policy and is effective as a manner of relief from or enforcement of arbitration proceedings previously had. No other provisions for a form of relief are available.

Further, though the grounds set forth in plaintiff's First Cause of Action were analogous to the grounds for relief set forth by the *United States Arbitration Act*, 9 U.S.C. Sec. 10 [TR. pp. 72, 73], plaintiff's Second Cause of Action was based upon violation of public policy as evidenced by the National Labor Policy. These allegations also encompassed the majority of the issues also raised by plaintiff's First Cause of Action and the pleadings and proof thereof have been previously set forth in Points D through D-5 and F, of Appellant's opening brief. When public policy is set forth as a reason to vacate an arbitrations award, the court must evaluate its content. *Metal Products Workers Union Local 1645 v. Torrington Co.*, 358 F. 2d 103, 105 (2nd Cir. 1966), *Local 453 International Union of Electrical Radio and Machine Workers v.*

Otis Elevator Co., 314 F. 2d 25, 29 (2nd Cir.), Cert. denied, 373 U.S. 949.

The lower court failed to evaluate or find upon the pleaded matters relating to public policy and the National Labor Policy. What appellee's argument in regard to the applicability of the Arbitration Act does is to evidence the magnitude of the error of the lower court in not considering what appellees urge "the policy of our National Labor Laws" in regard to the matters set forth in the Second Cause of Action, and therefore vacating the arbitration award.

Appellees' citation of *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960) does not support appellees' position. The *United Steelworkers* case, *supra*, solely involved the issue of whether or not arbitration should be compelled. The court held that due to the nature of collective bargaining agreements, the run of arbitration cases illustrated by *Wilko v. Swan*, 346 U.S. 427, were irrelevant in determining whether arbitration should be compelled.

b. Appellant Was the Principal Involved in the Arbitration and Has Primary Right to Set the Decision Aside.

Appellees overlook the fact that the Pacific Coast Longshore Agreement is a "trade agreement," not a contract of employment, and at all times during the alleged circumstances of cases five through twelve, Pete Velasquez was solely employed by and paid by Appellant, Local 13, and not in any manner under the "Trade Agreement." (Point C, pp. 41-45, App. Op. Br.). Pete Velasquez was at all times during the alleged incidents of cases five through twelve, an elected official of Appellant, Local 13, and his only contract of employment was the Constitution-By-Laws and General Rules of

Local 13. The Constitution provides the manner of Mr. Velasquez' election, his duties, his compensation, and paragraph 6 of the General Rules, page 41, provides: "6. *Salaried officers shall not accept any long-shore work during their term of office, * * **" [TR. p. 86].

Appellees allude to the authority of an "exclusive bargaining representative." The only authority that a "bargaining representative" may have is derived from Sections 7 and 9 of the *National Labor Relations Act* (29 U.S.C. Secs. 157, 159). Section 9(a) limits the collective bargaining to a "unit" and the collective bargaining for the "unit" to rates of pay, wages, hours of employment or other conditions of employment (*Ford Motor Company v. Huffman*, 345 U.S. 330, 336, 337 (1953)).

Certainly the appellees cannot contend that appellant's employees are part of a bargaining "unit" which Appellee, ILWU, represents for the purpose of collective bargaining with the Appellee, PMA, or that the Appellee, PMA, has the right to negotiate for the rates of pay and the hours and conditions of employment of Appellant, Local 13's employees. Such a contention would lead to a flagrant violation of Section 8(a)(2) of the Act, which prohibits an employer from "contributing financial or other support to a labor organization."

Such a position would lead to the same coercion which Local 13 complained of in the lower court, that is, as long as the decision of the arbitrators remain in effect, the officials of Local 13 must either bow to the will of the PMA or suffer the same consequences suffered by Pete Velasquez (Point D-3, App. Op. Br.).

The Area Arbitrator found Velasquez guilty on ten cases, to-wit: cases three (3) through twelve (12). The Area Arbitrator arbitrated cases five (5) through

twelve (12) *ex parte*. Each of these latter eight (8) cases involved Velasquez solely as a union official (Appendix I); however, the Area Arbitrator rendered only one decision containing his opinion and conclusions as to all the cases therein.

The Area Arbitrator's *ex parte*, acts as to cases numbered five (5) through twelve (12) were not and could not have been taken under the "trade agreement" as Velasquez was not part of the bargaining unit, for he was not employed under the trade agreement. As to cases numbered five (5) through twelve (12) the only contract of employment affecting Velasquez was the Constitution-By-Laws and General Rules of Local 13. Local 13's officials are not a bargaining unit over which either appellee can arbitrate or claim jurisdiction. Arbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute which he had not agreed to submit. *United Steelworkers v. Warrior and Gulf Navigation Co., supra*, page 582. There was not only a contract between Appellee, PMA, and Appellant, Local 13, to arbitrate matters regarding its official, appellant had refused to enter into such an arbitration.

Had not cases five through twelve been outside the bargaining unit, the result would still be the same, for appellees ignore the salient facts in urging Appellant Local 13 as a sub-agent of the ILWU, and in urging the ILWU to be the exclusive bargaining agent with the exclusive right to attack the arbitration awards.

The arbitration proceeding before the Area Arbitrator was had by Appellee PMA, against Appellant Local 13, as the principal, the ILWU was not a party. The award is set forth as Appendix I and is captioned:

In the Matter of a Controversy
Between
PACIFIC MARITIME ASSOCIATION
Complainant
and
INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 13
Respondent

The issue is set forth on the first page of the arbitrator's decision as follows:

“Issue: Employers' Complaint Filed Against Pete Velasquez, #3499 (New No. 31090) Claiming Violations of Current Agreement.”

The arbitration award clearly shows that in eight (8) of the ten (10) cases in which Velasquez was found guilty, he was employed as a business agent of Appellant, Local 13 (Appendix I, pp. 2, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18).

The Pacific Coast Longshore Agreement, Sec. 17.15 provided that the grievance procedure had to be exhausted before one could use other remedies outside of the agreement. Section 17.261 of the Pacific Coast Longshore Agreement provided means for referring a dispute regarding an arbitration to the Joint Coast Labor Relations Committee, and if the “Committee cannot agree, to the Coast Arbitrator for *review*.” Pete Velasquez was employed under the “Trade Agreement” as to cases three and four, and the procedure was followed to exhaust the remedy, with the Coast Arbitrator noting Pete Velasquez' appeal (Appendix II, p. 2).

After exhausting the procedure, Appellant Local 13 filed its action which was removed to the lower court. Local 13 brought Appellee ILWU into the action on

two grounds. One ground was based on the allegation that the ILWU was a party in interest who had refused to join in the action and was therefore named therein as a defendant [TR. p. 67]. The Second ground was the ILWU's participation in the conspiracy to bring about the award [TR. p. 73].

The lower court found that the Joint Coast Labor Relations Committee considered the grievance and "were unable to agree on a resolution of the matter and it was referred to the final step in the arbitration process, a *hearing before Sam Kagel, the Coast Arbitrator*" [TR. p. 615, Find. 15] (emphasis added). The lower court further found "a hearing was held before the Coast Arbitrator at which the employee and union were represented by officials of the ILWU." [TR. p. 615, Finds. 15, 16].

Local 13 was not a sub-agent in regard to the arbitration, as urged by appellees. Local 13 was the principal in the arbitration and selected as such by the Appellee, PMA, who chose Local 13 as its adversary. Plaintiff, Local 13, was the only adversary of the PMA in the arbitration; the subsequent hearing "*for review*" as provided by Section 17.261, was tantamount to an appeal from the area arbitration with Local 13 remaining the principal being represented by the ILWU on the appeal. The hearing before the Coast Arbitrator was the final step in the same arbitration which was conducted against Local 13 before the Area Arbitrator. In such Area proceeding, Local 13 and the employee were represented by officials of Local 13 [TR. p. 614, Find 11].

The appellee recognized the position of Local 13 by bringing its counter-claim against Local 13 to confirm the arbitrator's decision [TR. pp. 141, 142]. The lower court recognized the position of Local 13 by confirm-

ing the award against the Local [TR. p. 639]. To allow the bringing of an arbitration against a local and thereafter deny the Local relief therefrom, not only lacks mutuality but accomplishes an absurd result. The Appellee, PMA, who brought the arbitration against Local 13, is estopped to deny appellant's position as a principal to the arbitration and appellant's right to seek relief.

The case of *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332 (1944), cited by appellees, does not support appellees' position that appellant could not maintain the action in the lower court: The case in fact supports appellant's right to maintain the action; at page 336 the court stated:

“But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary of the collective trade agreement. * * *”

Likewise, the United States Supreme Court in *Smith v. Evening News*, 371 U.S. 195 (1962) held that an individual member was given the right by the *National Labor Relations Act* of 1947, Section 301, to sue for violation of the collective bargaining agreement and upheld the suit being brought in the member's name. Further, when the employer and Union conspire to deprive an employee of his rights, then the normal procedural remedies have failed and irrespective of the provisions of the collective bargaining agreement, as to who may proceed to seek the remedies, an action may be brought by the member in court to obtain the required relief and completely settle the issues. *Hiller v. Liquor Salesman's Union Local No. 2* (2nd Cir. 1964), 338 F. 2d 778, 779. The conspiracy was pleaded in paragraph XXI of appellant's complaint [TR. pp. 73, 74] and the proof thereof was set forth under Point I of Appellant's opening brief.

The above holdings are consistent with the legislative history of Section 301, which, as set forth in *Textile Workers Union v. Lincoln Mills*, *supra*, page 453, showed that the "aggrieved party" should have a right of action in the Federal Courts, and at page 456, set forth that "interested individual employees" should have a right of action under Section 301.

Appellant had the right to proceed to set the award aside as a principal; in fact, it was appellant's duty. Such duty was recently recognized in the case of *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 700, 86 S. Ct. 1107, 16 L. ed. 192, where the court allowed the Union to sue in regard to a collective bargaining agreement, to recover on behalf of its members without assignment of their claims. In doing so, the court, at page 700, stated:

"Any . . . labor organization may sue . . . in behalf of the employees whom it represents in the courts of the United States * * *"

Velasquez was a member of appellant's Local 13, and no other membership or right of representation is shown for him. The first page of the Pacific Coast Longshore Agreement provides that the Agreement is entered into by the International Longshoremen's and Warehousemen's Union "on behalf of itself *and each and all of its longshore locals in California, Oregon and Washington . . . and all employees performing work under the scope, terms and conditions of this Agreement.*" (emphasis added). Appellant's rights under the Agreement are established.

It is worthy of note that the first paragraph of the "Trade Agreement" along with Section 1.71 each confine the effect of the Agreement to those working under it.

Appellant's responsibility for a contractual violation of the Pacific Coast Longshore Agreement is clear. *United Electrical and R&M Workers v. Oliver Corp.*, (8th Cir. 1953) 205 F. 2d 376. If appellant is bound by the contract, it can seek relief thereunder. If appellant had the duty to arbitrate, appellant had the correlative right to set the arbitration award aside for any error arising therein. If appellant did not have the duty to arbitrate, then the *ex parte* arbitration is void, and being void, the appellant has the right to proceed to set same, together with its effect, aside, as same does not arise under the collective bargaining or any agreement.

Appellee's brief note in regard to exclusive jurisdiction of the National Labor Relations Board is dealt with in Point V of this Brief.

II.

ANSWERING APPELLEES' POINT II, APPELLANT WAS NOT REQUIRED TO PLEAD OR PROVE BAD FAITH ON THE PART OF THE ILWU TO RECOVER: HOWEVER, LOCAL 13 DID PLEAD AND PROVE SUCH BAD FAITH.

a. Local 13 Was Not Required to Show Hostile Discrimination or Invidious Conduct on the Part of the ILWU.

The opposition to the above matter set forth by appellee has previously been covered by Point I hereof and Points A and B, pages 33 to 45, of appellant's opening brief, and does not require further answer.

1. The Result Reached in the Grievance Procedure Is Subject to Being Set Aside.

The cases of *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S.

593 (1960) and *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960) do not support the proposition for which appellee cites them, to-wit, that courts will not review the merits of the controversy or substitute their interpretation of the collective bargaining agreement.

In both *United Steelworker of America v. American Mfg. Co.*, *supra*, and *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, *supra*, the lower courts weighed the evidence and decided the merits of the issue as to whether or not there was an arbitratable grievance prior to any arbitration, and therefore denied arbitration, neither case is in point. In the case of *United Steelworkers v. Enterprise Wheel and Car Corp.*, *supra*, the court at page 596 held that the refusal of the courts to review the merits of the award was a proper approach, and at page 597, stated:

“Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse the enforcement of the award.”

The arbitration Agreement in the case of *United Steelworkers v. Enterprise*, *supra*, was extremely liberal and the arbitrators’ powers were not restricted as Sections 17.52, 17.53, and 17.62 the present agreement restrict the arbitrator. The agreement further provided that the award shall be “final and binding.” However, even with the liberal provisions, the court set limitations upon the arbitrator’s power and provided for the setting aside of the award on review. Appellees and the lower

courts' position are tantamount to urging that relief cannot be granted under any circumstance, other than by breach of duty of fair representation, such a position is tantamount to urging that any entity performing the representation is never in a position to seek relief, regardless of the result.

The matter is more fully covered in Points G and J of appellant's opening brief.

2. Local 13 Has Shown a Breach of the Duty of Fair Representation, Though Not Required to Do so to Prevail.

As urged by appellees, the principal issue is not that as confronted the Supreme Court in *Humphrey v. Moore*, 376 U.S. 335 (1964); the principal issue is appellant's rights to have the decisions of the arbitrators set aside on grounds analogous to the *Arbitration Act*, 9 U.S.C. Secs. 1-10, or on the grounds of the decision's violations of public policy as evidence by the National Labor Policy and set forth in Points F and D through D-5, of appellant's opening brief. However, due to appellant's pleading of appellees' connivance and conspiracy to bring about the fraud, undue means and other acts involved in obtaining the arbitrator's decisions appellant was entitled to any and all relief available and the doctrines of *Humphrey v. Moore*, *supra*, and *Vaca v. Sipes*, 386 U.S. 171 (1967).

Appellees rely heavily on the case of *Humphrey v. Moore*, *supra*, and refer extensively to its holding; however, appellees ignore the distinguishing factors of the case. The case did not involve arbitration and was an action brought by a member against both the Local Union and the International Union, alleging the Local Union deceitfully connived with the International Union to deprive plaintiff therein and others of employment rights, (p. 343). As was set forth in the concurring opinions of Justices Goldberg and Brennan, the action

was an “individual employee’s action for a union’s breach of its duty of fair representation.” (p. 351).

In the present case, appellant, as a party to the collective bargaining agreement and as the principal involved in the arbitration, has the right to set the decisions of the arbitrators aside, the plaintiff had no such right in *Humphrey v. Moore, supra*, and his Local Union brought about the matter of which he complained. Additionally, in the present case, Appellant, Local 13, also has the right to assert such additional grounds, for the benefit of the local and its member as may exist for lack of fair representation. Both the appellant, Local 13, and its member, Pete Velasquez, were damaged and continue to be damaged as Appellee, PMA, continues to coerce and harass the officers of Local 13 with threats of deregistration under the arbitrator’s decisions [TR. pp. 412, 413, 446].

As was set forth in *Vaca v. Sipes, supra*, the duty of fair representation is breached when the union’s conduct is either “*arbitrary, discriminatory, or in bad faith.*” (p. 190). In the present case, the lower court found “that the award manifestly disregards the collective bargaining agreement and the law” [TR. p. 618, Find. 18 K], and that the ILWU acquiesced in the award which was “flagrantly against Union principles” [TR. p. 618, Find. 18 I]. These findings alone were sufficient to show each of the three grounds for breach of the duty, any one of which is sufficient to prove a breach of the duty of fair representation. These findings arose from an arbitrator’s decision which was based upon the representation of International President, Harry Bridges, before the Arbitrator, and were a result of the breach of his duty. However, many additional grounds for breach of the duty of fair representation exist, many of them being set forth in App. Op. Br. at Point I, pp. 102-106).

- b. Local 13 to Be Successful, Is Not Required to Show That the ILWU Acted Outside Its Authority as Collective Bargaining Agent; However, Such Showing Was Made.

Local 13 Does Not Have to Attack the Collective Bargaining Agreement.

Appellees urge that Local 13, to succeed, must attack the collective bargaining agreement, not the award. The premise is not well founded and the attack need not be directed to the collective bargaining agreement.

First, as Appellee continues to do throughout its brief, Appellee bases its argument on the erroneous premise that a union official is a longshoreman. Section 1.71 of the Agreement provides the definition of a longshoreman which is: "The term 'longshoreman' as used herein shall mean any man *working under this Agreement.*" (emphasis added). Paragraph 6, page forty-one (41) of the Constitution-By-Laws and General Rules of Local 13 [TR. p. 86] provides: "Salaried officers shall not accept any longshore work during their term of office * * *." The Pacific Coast Longshore Agreement is a "trade agreement" and not a contract of employment; therefore, Local 13 officers who were solely employed by and paid by Local 13 could not be either employees or longshoremen under the Pacific Coast Longshore Agreement. *MacKay v. Lowes, Inc.*, 182 F. 2d 170, 172 (9th Cir. 1950) *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696.

The foregoing is more fully covered in Point C, pages 45-48 of appellant's opening brief. As Pete Velasquez was not employed under the Pacific Coast Longshore Agreement in Cases 5 through 12, the question of the Pacific Coast Longshore Agreement or Section 17.81 (providing for deregistration of longshoremen) thereof have no application as to those cases. The

arbitration was *ex parte* without authority or agreement to arbitrate, a matter which was completely outside of the Pacific Coast Longshore Agreement.

Appellees continue by asserting that “the Coast Arbitrator applied the contract provisions in accordance with the expressed intent of the parties to the contract” and continue by quoting out of context a portion of *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960) for the proposition that Local 13 would therefore be bound by the award, even though they could show *Humphrey v. Moore* discrimination. Even though the *United Steelworkers* case provided that the arbitration award would be “final and binding” and had much more liberal terms for arbitration than the Agreement in question, the case at page 597, provided that the Arbitrator is confined to interpretation and application of the Agreement, does not sit to dispense his own brand of industrial justice, that the award is legitimate only so long as it draws its essence from the collective bargaining Agreement, and when the Arbitrator’s words manifest an infidelity to this obligation, the Courts have no choice but to refuse to enforce the award.

Section 17.52, 17.53 and 17.62 of the Collective Bargaining Agreement confine the Arbitrator to interpreting the Agreement as written, and Section 22.1 provides that the Agreement cannot be amended, altered, modified or changed, except by written agreement between the parties. The arbitrator, being restricted to the interpretation of the Agreement as written, could not, as is more fully set forth in Point H-2 of Appellant’s opening brief, arrive at a conclusion applying Section 17.81 to union officials. In addition, irrespective of the wording of the Agreement, the Coast Arbitrator could not apply Section 17.81, or any other provision of the Agreement, to one not employed there-

under. The Agreement is a “trade agreement,” not a contract of employment, and appellant’s officials are not and cannot be employed thereunder.

Appellees, as they again do later in their brief, are apparently relying upon the statements of Harry Bridges as being the intent or interpretation of Section 17.81. If the Arbitrator so relied on such statement, then he exceeded his power by not interpreting the “trade agreement” “as written” and wrongfully brought about a modification of the contract which was not in writing, as required by Section 22.1. By doing so, the Arbitrator would become a part or tool of the connivance and conspiracy alleged in appellant’s complaint as he participated in wrongfully extending the interpreted effect of the collective bargaining agreement to penalize and deregister Pete Velasquez for activities that did not and could not come under the purview of the “trade agreement.” Such a procedure would also constitute a procuring of the award by “undue means” or in excess of the arbitrator’s “powers,” therefore subjecting the award to being set aside under the *Arbitration Act*, 9 U.S.C. Sec. 10.

Local 13 Has Shown That the ILWU, in Agreeing to the Interpretation of Section 17.81, Acted Outside of Its Authority, Though It Need Not Do So.

Appellees urge the case of *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953) for the proposition that in agreeing to Section 17.81, the ILWU acted within the scope of its bargaining authority. First: the bargaining authority of the ILWU was for longshoremen employed by the PMA, not union officials employed by Local 13. Second: *Ford Motor Company v. Huffman*, *supra*, does not support appellees’ position.

Ford Motor Company v. Huffman, supra, involved the negotiation of provisions giving seniority credit for military service. The court, at page 322, stated:

“Nothing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard *public policy and national security*.” (emphasis added).

The *Ford Motor Company* case differs greatly from the present case in that they are exact opposites. The *Veterans Preference Act* and the Secretary of Labor had adopted a similar policy of veterans' preferences (pp. 340-341) and the Union, in the *Ford Motor Company* case, was merely furthering public policy as evidenced by the *Veterans Preference Act* and the Secretary of Labor. In the present case by applying Section 17.81 to Union officials, appellees were proceeding directly against the provisions of the *National Labor Relations Act* and Public Policy, as evidenced by the National Labor Policy. The manner in which the decision was violative of the provisions and intent of the *National Labor Relations Act* and Public Policy, as evidenced by the National Labor Policy, are set forth in Points D through D-5 and Point F of appellant's opening brief.

The authority of every bargaining representative is derived from the *National Labor Relations Act*, more particularly Sections 7 and 9, *Ford Motor Company v. Huffman, supra*, pp. 336, 337. Section 9(a) limits the collective bargaining to a “unit” and collective bargaining for the “unit” to rates of pay, wages, hours of employment, or other conditions of employment. The

foregoing gives no rights in regard to appellant's officials. First, the appellee employer cannot claim appellant's officials, who are appellant's employees, to be in their bargaining "unit" while they are solely employed and paid by appellant. Second, the International whose only right to bargain arises from the *National Labor Relations Act*, cannot contract or agree contrary to the Act. Any such contract or agreement would be outside of their authority and void.

In regard to the "wide range of reasonableness" which appellees claim the ILWU has in bargaining, such bargaining right was limited at page 178 of the case of *Vaca v. Sipes, supra*, "to serving the interests of all members without hostility or discrimination toward any, * * *" (emphasis added). The discrimination toward Pete Velasquez is clearly shown by the fact that he was the only official to which 17.81 was ever applied, even though had the application been possible, there was then greater cause to apply it against prior union officials [TR. p. 397]. The same discrimination was shown by the statement of Mr. McEvoy (PMA's Area Manager) that they were out to get Velasquez and deregister him for what he had done as a union official, as he knew the contract too well [TR. pp. 421, 422]. The discrimination reached its ultimate when Harry Bridges sacrificed Velasquez to gain the belly packing issue [TR. p. 424], particularly after Bridges had previously told Velasquez, in a hostile and angry manner, that he was the only one who could save him before the Coast Arbitrator, but he, Velasquez, was done, through and all washed up [TR. p. 447, 202, 203]. The point of discrimination and bad faith is more fully covered in Point I of appellant's Opening Brief, pp. 102-106.

**Section 17.81 Is Not Within the Range of Reasonableness
When Applied to Union Officials.**

Appellees urge that Section 17.81 of the Pacific Coast Longshore Agreement is within the range of reasonableness. This may be correct when one correctly considers the agreement as a “trade agreement” and properly excludes from its effect and operation, all persons who are not employed thereunder. However, for the reasons set forth herein and those set forth in appellant’s opening brief, when Section 17.81 is applied to union officials who are employed and paid by the union, the section not only exceeds the range of reasonableness—it goes outside of the bargaining “unit.” There is no power whatsoever for the employer and the ILWU to bargain for the right for the employer PMA, to take action against Local 13’s officials; such a procedure not only goes outside of the bargaining “unit,” it violates other provisions of the *National Labor Relations Act* and Public Policy.

Further, Section 17.81 by its terms and the terms of Section 1.17 does not include union officials (See Point H-2, App. Op. Br.). Appellees’ references to the statements of Harry Bridges adds nothing, for the arbitrators were limited to the contract as written. If the arbitrators considered Mr. Bridges’ statement, which the Coast arbitrators’ decision evidences he did, (Appendix II, App. Op. Br.), then the Coast Arbitrator exceeded his power, and not only did not construe the contract as written—he illegally modified it contrary to the express provisions of Section 22.1 and became a part of the connivance and conspiracy.

**Local 13 Does Not Have to Show Bad Faith in the
Negotiation of Section 17.81.**

Appellant does not, as set forth by appellee, have to show that there was bad faith in the negotiations of Section 17.81. As previously set forth, 17.81, as written, does not and cannot include union officials; it is appellee's and the Coast's arbitrators' erroneous conclusions and excess of powers which include union officials in Section 17.81. However, had Section 17.81 been negotiated to include union officials, it would then be void as previously set forth as being violative of and contrary to Public Policy and the *National Labor Relations Act*.

III.

**THE EVIDENCE ADDUCED BY LOCAL 13 WAS
MORE THAN SUFFICIENT TO RAISE MATERIAL
ISSUES OF FACT REGARDING THE IMPROPER
CONDUCT OF THE ILWU.**

The appellees merely follow the approach taken by the lower court and instead of considering the facts in a light most favorable to appellant as was required, *Poller v. Columbia Broadcasting System*, 386 U.S. 464, 473, appellees, as the lower court did, take the facts out of context, depriving them of their meaning and effect, and attempt to justify a small portion of such facts. The matter is dealt with in appellant's opening brief at Point M, pp. 116-119, and Point P., pp. 121-123; however, appellant sets forth herein a few of the more patent examples of the effect of the omissions and removal from context of the evidence referred to at pages 33-35 of appellees' brief. Appellant, for simplicity, follows appellees' numbering.

B. In referring to the conversation, appellees fail to consider and include that Ward was an International Officer on the Joint Coast Labor Relations Committee, and that Velasquez was intending to run against Ward, and the conversation continued with Ward stating they

would take care of Velasquez up there [TR. pp. 409, 410 and 432].

C. and D. The statements fail to consider and include the facts that the only times when the PMA President, Paul St. Sure and ILWU President, Harry Bridges, appeared at the port together, the result was to take action against Local 13 and that Bridges consistently took the position of the employer, PMA, and failed to support the Local, such action included a 13 day lock out of Appellant, Local 13, by the employer, PMA, which was supported by Bridges and which was a violation of Section 11.1 of the Pacific Coast Longshore Agreement and of much greater magnitude than anything complained of by Appellee, PMA, in its ex parte arbitration and deregistration of Pete Velasquez [TR. pp. 410, 438, 439, 448, 450].

E. E not only contains omissions—it is not supported by the record in that it was not a request to live up to the arbitrator's decision regarding jurisdiction. The more salient facts which were omitted are that the arbitrator called, prior to hearing Cases 5 through 12, and after expressing his opinion that Velasquez was guilty, requested that the President of Local 13 at least go through the motions of a defense so that it would look better [TR. p. 440].

F. First, there is no evidence that Bridges is an "outstanding" labor leader, and the threatening and hostile manner of Bridges' statements is ignored. Further, Bridges stated in a hostile and angry manner, that he was the only one who could save Velasquez before the Coast Arbitrator, but that Velasquez was done, through, and all washed up. [TR. p. 447, 202, 203].

G. The issue omits the fact that Bridges stated they had to *sacrifice* Velasquez to gain the belly-packing issue. This clearly shows discrimination under *Vaca v. Sipes, supra*, which at page 178 provides that the obli-

gation is “to serve the interests of all members without hostility or discrimination *toward any*.” (emphasis added). Further, there is no evidence to support the contention or finding that there was a larger number affected by the “belly-packing” issue than the Velasquez issue. Due to the coercive effect, the Velasquez issue affected the entirety of Local 13, whose jurisdiction consisted of the Los Angeles-Long Beach Harbors [TR. p. 446]. (Point D-3, App. Op. Br.). The belly-packing issue affected Portland, which for all the record shows, could have been one-fifth the size of Local 13 [TR. pp. 423, 424].

H. H. ignores the fact that while a union officer, Pete Velasquez won substantially all of the labor disputes, including arbitrations, and that the statement of the PMA’s Area Manager was that they were going to deregister Velasquez for what he had done as a union official, as he knew the contract too well [TR. pp. 397, 421, 422].

I. The claim of Local 13 that the position of Harry Bridges flagrantly violated union principles, was itself a finding of the lower court, which found: “That the ILWU acquiesced in the Coast Arbitrator’s award which was ‘flagrantly against union principles.’” [Find. 18, I., TR. p. 618].

J. The conversation alleged between the arbitrators and found by the court, is non existent and not supported by the record. The conversation was between the arbitrator and Local 13’s President, Curt Johnston, and in effect the arbitrator was in the position of an advocate trying to solicit Curt Johnston to accept the award and give up the Local’s right to redress. The arbitrator suggesting that Velasquez, to be registered, would have to agree not to run for office again [TR. pp. 443, 444].

IV.

THE CONFLICT BETWEEN FINDING 18K AND
CONCLUSION II IS PATENT.

Appellees indulge in rationale as to why Conclusion II is not in conflict with Finding 18K. However, the plain wording of the Conclusion and Finding show the conflict to be patent. Conclusion II sets forth that the awards and decisions of the arbitrators “* * * were and are in complete accordance with the terms of the Collective Bargaining Agreement * * *.” Finding 18K provides: “That the award manifestly disregards the Collective Bargaining Agreement and the law.” It is difficult to fathom how the award could “manifestly” disregard the Collective Bargaining Agreement and the law and at the same time be in complete accordance therewith.

The other findings to which Appellees contend no objection was made, do not support the award as urged by appellees. The findings merely confirm that an arbitration was had.

Appellees’ urging of *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578, adds nothing to their position. The United Steelworkers’ case solely involves the issue as to whether or not arbitration should be compelled. Due to the nature of a collective bargaining agreement which may leave gaps to be filled in by practice, the court held that in determining whether arbitration should be compelled, the run of arbitration cases, such as *Wilco v. Swan*, 346 U.S. 427, become irrelevant to the problem (pp. 578-582).

United Steelworkers v. Warrior and Gulf, *supra*, did not purport to deal with a manifest disregard for the law or to eliminate it as a ground compelling the setting aside of an arbitration award. What the case did set forth is that arbitration is a matter of contract

and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. The latter is applicable to the facts of the present case; there is no contract between the PMA and Local 13 regarding the employment of Local 13's officials, and Local 13 not only did not agree to arbitrate regarding their officials—they refused.

V.

THE DISTRICT COURT WAS NOT PREEMPTED BY
THE JURISDICTION OF THE NATIONAL LABOR
RELATIONS BOARD.

Appellees cite *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and subsequent cases for the proposition that all charges that assert, even arguably, unfair labor practices as defined by Sections 7 and 8 of the *National Labor Relations Act*, 29 U.S.C. Secs. 157 and 158, are within the exclusive jurisdiction of the National Labor Relations Board and the courts are preempted from hearing said matters in relation to the setting aside of an arbitration.

None of the appellees cited cases involve arbitration, and none is authority for appellees' proposition. The same appellees urged that preemption doctrine in *Williams v. Pacific Maritime Association et al.*, 384 F. 2d 935 (9th Cir. 1967). Appellees' position was rejected in the *Williams* case by this Circuit, based upon the holding of *Vaca v. Sipes*, *supra*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).

The cases considering the subject of arbitration are uniformly contrary to those cited by appellees. In *Textile Workers of America v. Lincoln Mills of Alabama*,

353 U.S. 448, 77 S. Ct. 912, in holding that the United States District Court had the right to compel arbitration, and in speaking of the *National Labor Relations Act*, the Court at page 452 stated:

“The bills as they passed the House and Senate, contained provisions which would have made the failure to arbitrate an unfair labor practice. * * * This feature of the law was dropped in conference. As the Conference Report stated, “ ‘Once parties have made a collective contract, the enforcement of that contract should be left to the usual processes of law *and not to the National Labor Relations Board.*’ ” (emphasis added).

In the case of *Carey v. General Electric Company*, 315 F. 2d 499 (2nd Cir., 1963) where similar contentions were made regarding exclusive jurisdiction being in the National Labor Relations Board in an attempt to prevent arbitration, the Appellate Court at page 503 stated:

“Three of the union’s grievances charge conduct on the part of the employer which the employer asserts can only be evaluated by the National Labor Relations Board. It is therefore urged that exclusive jurisdiction in the Board precludes adjudication or arbitration of the grievances under the so called preemption doctrine. See *San Diego Bldg. Trades Council v. Carmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 775 (1950), *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 338 (1953). Judge Palmieri found the preemption doctrine inapplicable and ordered arbitration of each grievance. We agree and affirm the relevant portion of his order.”

In the latter but similar case of *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 84 S. Ct. 401, in upholding the right to compel the arbitration though the dispute could also involve an unfair labor practice, at page 268, the Court stated:

“* * * But the existence of a remedy before the Board for an unfair labor practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in *Smith v. Evening News Assn.*, 371 U.S. 198, 83 S.Ct. 267, 9 L.Ed 2d 246. We think the same policy considerations are applicable here; and that a suit either in the federal courts, as provided by Sec. 301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. Sec. 185(a), * * *)”

The compelling reason behind the Court's ordering arbitration of matters which may be within the jurisdiction of the National Labor Relations Board is summed up in the Supreme Court's quoting in the *Carey* case, *supra*, at page 265, with approval, as follows:

“The underlying objective of the national labor laws is to promote collective bargaining agreements through the arbitration process.”

A further consideration is that the National Labor Relations Board has on occasion declined to exercise its jurisdiction in respect to unfair labor practices where the Federal Labor Policy would be best served by leaving the parties to their remedies at law. *Speilberg Mfg. Co.*, 112 N.L.R.B. 1080; *Consolidated Aircraft Corp.*, 57 N.L.R.B. 694. The Rule of *San Diego Building Trades Council v. Garmon*, *supra*, has been modified so that the Courts are not divested of jurisdiction in suits arising under Section 301 of the

National Labor Relations Act, Dowd Box Company v. Courtney, 368 U.S. 502, 513 (1962), *Local 174 Teamsters v. Lucas Flour Company*, 369 U.S. 95, 101 (1962). Appellees removed the matter to the Federal Court on the grounds that jurisdiction existed under Section 301.

The courts have themselves compelled arbitration in cases where the alleged breach of contract could clearly have been a basis for an unfair labor practice before the National Labor Relations Board.

United Steelworkers, etc. v. New York Mining Co., 273 F. 2d 352 (10 Cir. 1959);

Lodge No. 12, International Assn. of Machinists v. Cameron Iron Works, 257 F. 2d 457 (6th Cir., 1958);

United Electrical and Machine Workers v. Worthington Corp., 236 F. 2d 364 (1st Cir., 1956);

Freight Drivers and Helpers Local Union v. Quinn Freight Line, 195 F. Supp. 180 (D Mass 1961);

Retail Shoe and Textile Salesmen's Union v. Sears Roebuck, 185 F. Supp. 558 (N.D. Cal. 1950).

In similar respect, the Courts have compelled arbitrations involving alleged violations of no-strike provisions, *Drake Bakeries, Inc. v. Local 40 American Bakery and Confectionary Workers International*, 370 U.S. 254, 82 S. Ct. 1346, and the right to discharge employees for violation of a no-strike clause, *United Textile Workers v. Newberry Mills, Inc.*, (4th Cir. 1962) 315 F. 2d 217.

The question is well and authoritatively settled that in furtherance of the National Labor Policy, which

favours arbitration, the fact that otherwise unfair labor practices exist in or regarding an arbitration does not preempt the courts or restrict them in any manner. The alleged facts which would also constitute unfair labor practices were facts which the lower court was required to hear and consider.

Appellees continue to avoid the issue by referring to the deregistration of "longshoremen" who repeatedly violated the Collective Bargaining Agreement. Such is not that which occurred. The Coast Arbitrator, on review, considered ten (10) charges against Pete Velasquez. Of the ten (10) charges only two of them arose while Velasquez was a longshoreman. The definition of a longshoreman is clearly set forth in Section 1.71 of the "Trade Agreement." The other eight charges arose when Velasquez was not employed under the "Trade Agreement" but was solely employed by and paid by, Appellant, Local 13, pursuant to the terms of Local 13's Constitution-By-Laws and General Rules, which was Velasquez' only contract of employment [TR. p. 86].

The two matters occurring while Velasquez was a longshoreman were Cases 3 and 4, involving the SS president Quezon and the SS President Michigan. Each of these matters was briefly set out in Appendix V of appellant's opening brief. In each of these matters, Pete Velasquez and Gang No. 55 were following the instructions of ILWU President, Harry Bridges. Each of these two matters was a minor matter which appears to be an incident created by Appellee, PMA, for the purpose of deregistration.

Prior to the arbitration and the day following the last alleged complaint (the SS President Quezon, Case No. 3), the PMA's Area Manager, John McEvoy, who claimed to have been considering the matter for a long

time, stated that they were going to deregister Pete Velasquez for what he did as a union official; his reason being that Velasquez knew the contract too well. This is exactly what happened, for to be able to find Velasquez a repeated offender as required by Section 17.81 of the "Trade Agreement" the Coast Arbitrator included all of the charges occurring while Velasquez was employed as a union official. (Appendix II, opening brief).

The issue is not the deregistration of a longshoreman, it is the black-balling of a union official, not from a single employer, but from substantially an entire industry. This is similar treatment as that which was accorded Stanley Weir and some 81 others by appellees, which was referred to by the PMA's own agent, Robert Hall [TR. p. 449], and which appeared before this Circuit in *Williams v. Pacific Maritime Association*, *supra*. Velasquez' real offense is that he incurred the wrath of Harry Bridges, at the same time he incurred the displeasure of the PMA, thus the conspiracy.

Appellees cite the case of *Crucible Steel Casting Company*, 101 N.L.R.B. 494, which does not support their position. In the cited case, the discharged employee, Flagg, was an employee of the Company at the time of the alleged act—he was not an official employed by the union. Flagg had repeatedly violated the terms of his employment with the Company and refused to carry out the instructions of his foreman. The cases in point regarding the impropriety of discharging an employee for union activities are set forth in Point D-2, pp. 55-61, of appellant's opening brief.

VI.

COMPLAINTS FIVE (5) THROUGH TWELVE (12)
WERE NOT ARBITRATABLE UNDER THE
GRIEVANCE PROCEDURE OF THE PACIFIC
COAST LONGSHORE AGREEMENT.

Appellees concede "that several of the grievances against Pete Velasquez involve incidents that occurred while he was serving as a union business agent." The Area Arbitrator's decision, (Appendix I), the Coast Arbitrator's decision, (Appendix II), and the transcript of the arbitration proceedings show these to be cases five (5) through twelve (12) which is eight (8) of the ten (10) cases under which Velasquez was found guilty.

However, appellees argue that Velasquez had a "registration status," and this is what he lost in the grievance procedure. What appellees' argument ignores was that irrespective of any status, Velasquez was not employed as a longshoreman during the period of the alleged eight (8) work stoppages. Therefore, by appellees' own position, Velasquez was discharged for union activities. Such a discharge is violative of public policy as evidenced by the National Labor Policy and is a further violation of the *National Labor Relations Act*. *Fort Wayne Corrugated Paper Co. v. N.L.R.B.*, 111 F. 2d 869, 874 (7th Cir. 1950). The foregoing remains the rule, regardless of whether the discharge was motivated either wholly or only in part by Velasquez' union activity. *N.L.R.B. v. Barberton Plastic Products, Inc.*, 354 F. 2d 66, 68 (6th Cir. 1965). In similar respect, if the discharge was for union activities, such a discharge would have been improper, even if Velasquez was employed as a longshoreman during the time of all of the alleged work stoppages. *N.L.R.B. v. Western Meat Packers, Inc.*, 368 F. 2d 65 (10th Cir. 1966).

Appellees compound the wrong by not only discharging Velasquez from employment under the employers bringing charges against Velasquez, but also from employers who allege no violations. The matter is more completely covered in Point D-2 of appellant's opening brief.

Appellees continue by asserting what they refer to as "the very broad scope of the grievance arbitration provisions" and assert that through these provisions, the appellees, PMA and ILWU "did agree to give the arbitrator the power to make the award he made." (Appellees' Br. pp. 44, 45).

The present matter was arbitrated *ex parte* as to cases 5 through 12; therefore, the problem commences with Section 17.25 of the Trade Agreement. The arbitrator rendered one decision which included 12 cases, 10 of which Velasquez was found guilty on (Appendix I). The matter was then referred to the Joint Coast Labor Relations Committee under Section 17.261, which provides for such referral when the decision of the Area Arbitrator is "claimed by either party to be in conflict with this agreement." Section 17.261 further provides that where the Joint Coast Labor Relations Committee cannot agree, the matter will be sent to the Coast Arbitrator for "*review*." Section 17.15 provides that remedies outside the grievance procedure cannot be sought until the grievance procedure is exhausted.

The matter was referred to the Coast Labor Relations Committee, which did not agree and referred the matter to the Coast Arbitrator for review. At these levels the matter is handled for the Local by Appellee, ILWU [TR. p. 615, Finds. 15, 16].

The within proceeding neither allows the arbitrators to pick themselves up by their own boot straps and rule that there was jurisdiction where none existed,

nor does it allow the Coast Arbitrator to make a ruling that is contrary to Public Policy or the *National Labor Relations Act*.

In cases 3 and 4, jurisdiction existed; however, the *ex parte* arbitration and decision was confined in one decision by the Area Arbitrator along with the other cases, and appellant was required by the acts of Appellee, PMA, and the Area Arbitrator, to proceed as above, to exhaust such remedy. What appellees urge is that they can act without jurisdiction and obtain an *ex parte* award, which would be final and binding, by Section 17.25 the "trade agreement", unless the steps in Section 17.261 were taken, and thereby vest jurisdiction where jurisdiction did not initially lie.

If appellees were correct that the ILWU and the PMA agreed to give the arbitrator power to make the award he made, then such agreement is further evidence of breach of the duty of fair representation for which *both* the employer and the International are liable. *Vaca v. Sipes, supra*, p. 178.

Appellees continue by conceding that Local 13 raised the jurisdictional question at the level of the Area Arbitration, but contend that the issue of jurisdiction was not raised at the upper two levels. Appellees contend (p. 45) that the objecting to jurisdiction at the lower level raised an arbitrable issue under Section 17.53. If this contention is correct, then appellees err in contending that jurisdiction was not raised in the upper two levels for then the arbitrable issue, if any, was jurisdiction. The procedure was to "*review*," and the responsibility of urging the jurisdictional issue at the upper two levels was that of the ILWU. If the ILWU chose to ignore the issue of jurisdiction and not urge it and instead agree with the employer, such conduct was merely further evidence of the violation

of the duty of fair representation and the connivance and conspiracy alleged. However, the Coast Arbitrator had before him the proceedings of the Area Arbitrator where jurisdiction was raised. [Ex. 7, pp. 4-7].

VII.

THE ARBITRATOR'S DECISIONS WERE AN IMPROPER MODIFICATION OF SECTION 17.81 OF THE TRADE AGREEMENT.

Appellees argue that the decision was not a modification of Section 17.81, and if it were, the modification was proper. Appellees then set forth Mr. Farley's statement before the Coast Arbitrator.

No such modification could be proper as Section 22.1 of the "Trade Agreement" provides that any modification, change, alteration, or amendment must be by written document executed by the parties. The ILWU and PMA could not even have amended the Agreement in writing to have it operate retrospectively and deny a member of his rights. What appellees further ignore is that the "Trade Agreement" cannot be modified or interpreted in such a manner as to be violative of Public Policy or the *National Labor Relations Act*.

The "Trade Agreement" was one which was approved by referendum ballot by the membership and no such interpretation had previously been given to Section 17.81 [TR. p. 447]. Further, as set forth in Point H-2 of appellant's opening brief, Section 17.81 was not subject to the interpretation given it by the Coast Arbitrator.

VIII.

THE ARBITRATION DECISIONS ARE AN ASSESSMENT OF DAMAGES AGAINST A UNION OFFICIAL FOR ALLEGED UNION ACTIVITIES.

Appellees, in their rational, ignore the facts, and contend that Local 13 is urging a proposition whereby it would be illegal to discharge any union member as he would be deprived from future earnings. Such is not appellant's position.

The issue involved is that Pete Velasquez was discharged for union activities which the employer contends violated the "Trade Agreement." If there was any penalty for violation of the "Trade Agreement" the employer was entitled to proceed against the Union but could not under any pretence, either directly or indirectly, penalize a union official for the activity. *Atkinson v. Sinclair Refining Company*, 370 U.S. 238.

Appellees put the matter thusly: "Simply stated, there was no money judgment." What appellees ignore is that the effect was the same, and the deregistration was tantamount to a money judgment. Pete Velasquez was deprived of his pension rights, mechanization fund rights, seniority in the industry as a winch driver, his future welfare rights, and further employment rights with substantially all of the employers in the industry [TR. pp. 399, 400]. Appellees cannot do indirectly that which they cannot do directly, for Section 301 must be liberally construed so as not to "undercut the Act and defeat its policy." *Atkinson v. Sinclair Refining Company*, *supra*, p. 249.

As long as the decision of the arbitrator is allowed to stand, the policy of the Act will be defeated and undercut and the officials of appellant, Local 13, will be required to take their orders from Appellee, PMA, or be subjected to the same penalty as Pete Velasquez. In cases numbered three (3) and four (4) Velasquez was following the directive of the International President, Harry Bridges (Appendix V). In cases numbered five (5) through twelve (12), Velasquez was following the orders of his superior officials and the membership [TR. pp. 395-397]. If a duly elected union business agent cannot rely upon the instructions of his own superiors, he must then, for his own safety, rely on the instructions of the employer, the Union then becomes a company dominated Union, contrary to the *National Labor Relations Act*. See Point D-3, pp. 55 to 61 of Appellant's opening brief, which is not replied to by Appellees.

IX.

POINTS IX, X, AND XI OF APPELLEES' BRIEF ARE ADEQUATELY COVERED IN APPELLANT'S OPENING BRIEF, AS SET OUT BELOW.

Point IX of Appellees' brief relating to Finding No. 19 is adequately covered in Point Q, pages 123, 127 of Appellant's opening brief.

Point X of Appellees' brief relating to whether the amended complaint stated a Cause of Action, is adequately covered in Point N, pages 119, 120, of Appellant's opening brief.

Point XI of Appellees' brief relating to the denial of relief to Appellant, Local 13, and confirming the ar-

bitration awards, is adequately covered in Points M and O, pages 116-119, 121, of Appellant's opening brief.

X.

**DECISIONS IN RESPECT TO ARBITRATIONS OF
COLLECTIVE BARGAINING AGREEMENTS ARE
NOT AUTHORITY IN RESPECT TO CASES FIVE
THROUGH TWELVE.**

As previously set forth cases five through twelve did not arrive under a collective bargaining, or "trade agreement". As there was no trade agreement between appellant and appellees regarding appellant's officials and employees, the cases cited by appellees which they contend limit appellants rights under a collective bargaining agreement have no application which could restrict appellant's rights.

Conclusion.

Appellees have offered no response to appellant's contention that the arbitrator's decisions were void as being a means by the employer to dominate and coerce Appellant, Local 13, in violation of Section 8(a)(1)(2) of the *National Labor Relations Act*, as set forth in Point D-3 of appellant's opening brief, nor have appellees made response to the issue set forth in Point F of appellant's opening brief, that said decisions were void as being contrary to public policy.

That for the reasons set forth herein and in appellant's opening brief, this Honorable Court should reverse the Lower Court's judgment in its entirety and remand the matter to the Lower Court, with instruc-

tions that judgment be entered vacating and setting aside the opinions and decisions of the Area and Coast Arbitrator which are void and invalid as a matter of law, said invalidity being shown on the faces of the said opinions and decisions.

Respectfully submitted,

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